DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-11121
Title: J. D. B., Petitioner
v.
North Carolina
Docketed: June 2, 2010
Linked with 09A871
Lower Ct: Supreme Court of North Carolina
Case Nos.: (190A09)
Decision Date: December 31, 2009
Questions Presented

---Date---	--------Proceedings and Orders----------
Mar 16 2010	Application (09A871) to extend the time to file a petition for a writ of certiorari from March 31, 2010 to May 30, 2010, submitted to The Chief Justice.
Mar 19 2010	Application (09A871) granted by The Chief Justice extending the time to file until May 28, 2010.
May 28 2010	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due July 2, 2010)
Jun 25 2010	Motion for leave to file amici brief filed by Juvenile Law Center, et al.
Jun 28 2010	Waiver of right of respondent North Carolina to respond filed.
Jul 15 2010	DISTRIBUTED for Conference of September 27, 2010.
Jul 30 2010	Response Requested. (Due August 30, 2010)
Aug 24 2010	Order extending time to file response to petition to and including September 29, 2010.
Sep 29 2010	Brief of respondent North Carolina in opposition filed.
Oct 14 2010	DISTRIBUTED for Conference of October 29, 2010.
Nov 1 2010	Motion for leave to file amici brief filed by Juvenile Law Center, et al. GRANTED.
Nov 1 2010	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Nov 29 2010	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Nov 30 2010	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Dec 10 2010	The time to file the respondent's brief on the merits is extended to and including January 28, 2011.
Dec 16 2010	Joint appendix filed.

Dec 16 2010 Brief of petitioner J. D. B. filed.

Dec 23 2010 SET FOR ARGUMENT ON Wednesday, March 23, 2011.

Dec 23 2010 Brief amicus curiae of American Bar Association filed.

Dec 23 2010 Brief amicus curiae of National Association of Criminal Defense Lawyers filed.

Dec 23 2010 Brief amicus curiae of American Civil Liberties Union filed.

Dec 23 2010 Brief amici curiae of Center on Wrongful Convictions of Youth, et al. filed.

Dec 23 2010 Brief amici curiae of Juvenile Law Center, et al. filed.

Jan 14 2011 CIRCULATED.

Jan 21 2011 The time to file the respondent's brief on the merits is extended to and including February 4, 2011.

Feb 4 2011 Brief of respondent North Carolina filed. (Distributed)

Feb 9 2011 Brief amicus curiae of the United States filed. (Distributed)

Feb 11 2011 Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Feb 11 2011 Brief amicus curiae of National District Attorneys Association filed. (Distributed)

Feb 11 2011 Brief amici curiae of Indiana, et al. filed. (Distributed)

Feb 22 2011 Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Mar 1 2011 Record received from Supreme Court of North Carolina. (1 envelope)

Mar 7 2011 Reply of petitioner J. D. B. filed. (Distributed)

Mar 23 2011 Argued. For petitioner: Barbara S. Blackman, Durham, N. C. For respondent: Roy Cooper, Attorney General, Raleigh, N. C., and Eric J. Feigin, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae).

PETITION FOR WRIT OF CERTIORARI

0911121

SUPREME COURT, U.S.
FILED
MAY 28 2010
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2009

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AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Jonathan Barker, am the petitioner in the above entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 0	$ n/a	$ 0	$ n/a
Self-employment	$ 0	$	$ 0	$
Income from real property (such as rental income)	$ 0	$	$ 0	$
Interest and dividends	$ 0	$	$ 0	$
Gifts	$ 0	$	$ 0	$
Alimony	$ 0	$	$ 0	$
Child Support	$ 0	$	$ 0	$
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$	$ 0	$
Disability (such as social security, insurance payments)	$ 0	$	$ 0	$
Unemployment payments	$ 0	$	$ 0	$
Public assistance (such as welfare)	$ 0	$	$ 0	$
Other (specify) food stamps	$ 120	$	$	$
Total monthly income	$ 0	$ n/a	$ 0	$

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
No job in last 2 years			$
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			$
			$
			$

4. How much cash do you and your spouse have? $ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
N/A		$	$
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings. NONE

☐ Home
Value

☐ Other real estate
Value

☐ Motor Vehicle #1
Year, make & model
Value

☐ Motor Vehicle #2
Year, make & model
Value

☐ Other assets
Description
Value

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	$	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
N/A		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home mortgage payment (include lot rented for mobile home)	$ 0	$ N/A
Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$
Home maintenance (repairs and upkeep)	$ 0	$
Food	$ 120	$
Clothing	$ 0	$
Laundry and dry cleaning	$ 0	$
Medical and dental expenses	$ 0	$

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 5.00	$ n/a
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$
Life	$ 0	$
Health	$ 0	$
Motor Vehicle	$ 0	$
Other	$ 0	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify):	$ 0	$
Installment payments		
Motor Vehicle	$ 0	$
Credit card(s)	$ 0	$
Department store(s)	$ 0	$
Other:	$ 0	$
Alimony, maintenance, and support paid to others	$ 0	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$
Other (specify):	$ 0	$
Total monthly expenses	$ 125.00	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☑ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I live with my mom. Neither of us have a job.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 17, 2010

Jonathan D Boston

(Signature)

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2009

J.D.B.

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of North Carolina

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER A COURT MAY CONSIDER A JUVENILE'S AGE IN A *MIRANDA* CUSTODY ANALYSIS IN EVALUATING THE TOTALITY OF THE CIRCUMSTANCES AND DETERMINING WHETHER A REASONABLE PERSON IN THE JUVENILE'S POSITION WOULD HAVE FELT HE OR SHE WAS NOT FREE TO TERMINATE POLICE QUESTIONING AND LEAVE?

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The opinion of the Supreme Court of North Carolina is officially reported at 686 S.E.2d 135 (2009) and is reproduced in the Appendix. (App. 1)

JURISDICTION

The judgment of the Supreme Court of North Carolina, affirming Petitioner's adjudication of delinquency and the subsequent disposition, was entered on 31 December 2009.[1] Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., amend V: "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

U.S. Const., amend XIV: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

A. INTRODUCTION

On 19 October 2005, two juvenile petitions were filed against J.D.B. in Orange County, North Carolina, each alleging one count of breaking and entering and one count of larceny. On 1 December 2005, J.D.B.'s counsel filed a motion to

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[1] The opinion of the Supreme Court of North Carolina was filed on 11 December 2009. The actual judgment of the Supreme Court of North Carolina was entered on the docket by the clerk 20 days after the date of the filing of the opinion. N.C. R. App. P. 32(b). A copy of the judgment is included in the Appendix. (App. 19)

suppress certain statements and evidence. After a hearing on 13 December 2005, the trial court denied the motion to suppress. The trial court did not make any findings of fact or conclusions of law at that time. On 24 January 2006, J.D.B. admitted all counts alleged in the petitions, but renewed his objection to the denial of his motion to suppress, and the trial court entered an order adjudicating J.D.B. delinquent. J.D.B. appealed the denial of his motion to suppress. The North Carolina Court of Appeals remanded to the trial court for findings of fact supporting its determination that J.D.B. was not in custody at the time he was questioned. *In re J.B.*, 644 S.E.2d 270 (N.C. App. 2007) (unpublished).[1] On remand, the trial court entered an order making findings of fact and conclusions of law in support of its denial of J.D.B.'s motion to suppress. J.D.B. again appealed the denial of his motion to suppress. A divided panel of the North Carolina Court of Appeals affirmed the trial court. *In re J.D.B.*, 674 S.E.2d 795 (N.C. App. 2009). J.D.B. appealed to the North Carolina Supreme Court. In a 4-3 decision, the court affirmed the trial court's denial of J.D.B.'s motion to suppress. App. 5.

B. THE EVIDENCE AT THE HEARING

On the afternoon of 29 September 2005, J.D.B., a thirteen-year-old special education student in the seventh grade at Smith Middle School in Chapel Hill, North Carolina, was sitting in his social studies class. Tp. 40. Officer Gurley, a uniformed police officer, removed J.D.B. from class. Tpp. 25, 40. Officer

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[1] Although J.D.B.'s first appeal to the North Carolina Court of Appeals was captioned "*In re J.B.*" and his subsequent appeal was captioned "*In re J.D.B.*," both appeals were by the same juvenile.

DiCostanza, a juvenile investigator with the Chapel Hill Police Department, had come to the school to question J.D.B. about two off campus breaking and enterings. Tpp. 6, 21. Officer Gurley took J.D.B. to a conference room, where three adults – two school officials and Officer DiCostanza – were waiting. Tp. 8. The door to the conference room was then closed. Tp. 37.

Officer DiConstanza knew that J.D.B. was thirteen. Tp. 23. North Carolina's enhanced *Miranda* rights for juveniles require that the juvenile be informed of his *Miranda* rights prior to custodial interrogation and be afforded the right to have a parent or guardian present during questioning. N.C. Gen. Stat. § 7B-2101 (2005). North Carolina law also requires the presence of a parent, guardian, or attorney for custodial questioning of a child under 14. *Id.* None of the police officers attempted to contact J.D.B.'s parent or guardian. Tp. 23. DiCostanza had the impression from other officers who had interacted with J.D.B.'s family that they were "resistan[t]" and "hostil[e]" to the investigation of J.D.B. Tp. 16.

Officer DiCostanzo told J.D.B. that he was an investigator from the Chapel Hill Police Department. Tp. 9. He then engaged in small talk with J.D.B. about sports and being the youngest sibling. Tp. 14. Officer DiCostanza then told J.D.B. that he wanted to follow up with J.D.B. about his encounter the previous weekend with police officers who questioned him about neighborhood break-ins. Tp. 9. DiCostanza asked if J.D.B. would talk to him about this, and J.D.B. said that he would. Tp. 9. Officer DiCostanzo did not tell J.D.B. that he had the right to remain

silent or that he was free to leave. Tp. 14. The interrogation of J.D.B. lasted 30 to 45 minutes. Tpp. 16, 42.

Officer DiCostanzo told J.D.B. that someone had seen him near one of the houses that was broken into. Tp. 10. J.D.B. stated that he had been going around the neighborhood attempting to get lawn mowing jobs. Tpp. 9-10. Officer DiCostanza asked J.D.B which houses he had gone to and in what order. Tp. 10. J.D.B. answered these questions. Tp. 10. He told Officer DiCostanzo that he had talked to his neighbor, Ms. Hemmer, on the day in question about cutting her grass. Tp. 10. Officer DiCostanzo told J.D.B. that he had spoken to Ms. Hemmer, who said she had told J.D.B. that she was not going to have him cut her grass any more because she had lost her job. Tp. 10. J.D.B. did not respond to DiCostanza. Tp. 10. At that point, Officer DiCostanzo told J.D.B. that he had the camera that was stolen in one of the breaking and enterings. Tp. 10. Officer DiCostanza asked Officer Gurley to hold up the camera to show J.D.B. that they had it. Tp. 15. J.D.B. remained quiet. Tp. 11.

Mr. Lyons, the assistant principal, told J.D.B. that he should "do the right thing because the truth always comes out in the end." Tpp. 11, 42. J.D.B. asked whether he would "still be in trouble" if he returned the stolen items. Tp. 11. Officer DiConstanza replied that "it would be helpful," but that "this thing is going to court . . . what's done is done." Tp. 11. DiCostanza told J.D.B. that he should help himself by "making it right." Tp. 11. DiCostanza told J.D.B. that if he was going to continue breaking into people's houses, DiCostanza "would have to look at

getting a secure custody order." Tp. 11. J.D.B. asked what a secure custody order was. Tp. 12. Officer DiCostanza explained that with a secure custody order, "you get sent to juvenile detention before court." Tp. 12. At that point, Officer DiCostanza told J.D.B. that he did not have to talk to him and that he could leave if he wanted to, but that DiCostanza "hoped [J.D.B.] would listen to what I had to say." Tp. 12. J.D.B. confessed to the breaking and enterings and larcenies and wrote a written statement. Tp. 12.

At the hearing, DiCostanza testified that he told J.D.B. that he was free to leave and did not have talk to him before J.D.B. confessed to the break ins. Tpp. 12, 28. However, the trial court found, in unchallenged findings of fact, that DiCostanza did not advise J.D.B. that he was free to leave until after J.D.B. confessed. App. 16.

After J.D.B. confessed, DiCostanza told him to take the school bus home. Tp. 16. Officer DiCostanza stayed at the school and completed a search warrant for J.D.B.'s residence. Tp. 16. DiCostanza testified that he prepared the search warrant because the initial officers encountered "resistance" and "hostility" from J.D.B.'s family and DiCostanza did not know if the family would cooperate with a search. Tpp. 16, 31-32. After a magistrate signed the search warrant, Officer DiCostanza went back to the police department, where his supervisor advised him to send an officer to J.D.B.'s residence to wait until the warrant could be executed. Tp. 17. An officer was waiting for J.D.B. when he got off the school bus. Tp. 18. When DiCostanza arrived with the warrant, J.D.B. took the officers into his

residence and gave them the stolen items. Tp. 18. No one attempted to contact J.D.B.'s guardian before the search of the home and seizure of the stolen items. Tpp. 30, 33.

C. HOW THIS ISSUE WAS PRESENTED AND DISPOSED OF ON APPEAL

The North Carolina Supreme Court rejected J.D.B.'s argument that he was in custody when Officer DiCostanza interrogated him. The court ruled that because J.D.B. was not in custody, he was not entitled to *Miranda* warnings. The North Carolina court was persuaded by this Court's decision in *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004), that "the custody inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect's individual characteristics—including age—could be viewed as creating a subjective inquiry." App. 5 (quoting *Alvarado*).

In short, the North Carolina court held that it could not consider J.D.B.'s age in determining whether he was in custody for *Miranda* purposes and the court concluded that J.D.B. was not entitled to *Miranda* protections. In its analysis, the court purported to consider "all the circumstances surrounding the interrogation" and to apply "an objective test as to whether a person in the position of the defendant would believe himself to be in custody." App. 4. However, the court refused to consider the objective fact that J.D.B. was a juvenile. As the dissent in *J.D.B.* observed, failure to consider age "would lead to the absurd result that, when required to determine whether a reasonable person in the defendant's situation would consider himself in custody, courts would apply exactly the same analysis,

regardless of whether the individual was eight or thirty-eight." App. 13 (Hudson, J., dissenting) (internal quotation marks and citation omitted).

REASON WHY THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE ALLOWED

THIS COURT HAS NOT SQUARELY DECIDED WHETHER A JUVENILE'S AGE MAY BE CONSIDERED IN MAKING A *MIRANDA* CUSTODY DETERMINATION AND THE NORTH CAROLINA SUPREME COURT'S DECISION ADDS TO THE ONGOING CONFLICT AND CONFUSION AMONG LOWER COURTS REGARDING WHETHER AGE MAY BE CONSIDERED.

Introduction

State and federal courts are divided on whether they may consider a juvenile suspect's age in making a *Miranda* custody determination. Historically, state and federal courts considered age when objectively determining whether a juvenile was in custody for *Miranda* purposes. In 2004, this Court decided *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004), which stated that "consideration of a suspect's individual characteristics—including his age—could be viewed as creating a subjective inquiry." Importantly, *Alvarado* was decided under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and was not a *de novo* review. *Id.* Many courts continue to consider a juvenile's age in the *Miranda* custody analysis, while others have relied on *Alvarado* in concluding that they may not consider a juvenile's age in determining whether he or she was in custody for *Miranda* purposes. These cases depart from this Court's established *Miranda* custody analysis: an evaluation of the totality of the circumstances surrounding the interrogation and a

determination of whether a reasonable person would have felt he was at liberty to terminate the interrogation and leave.

Absent clarification by this Court, lower courts will continue to apply varying definitions of "totality of the circumstances" and "reasonable person" when evaluating whether a juvenile was in custody for *Miranda* purposes. This uncertainty will undermine one of the purposes of *Miranda*: providing clarity for law enforcement officers. *See, e.g., Berkemer v. McCarty*, 468 U.S. 420, 430-31 (1984). Furthermore, this uncertainty is likely to result in more juveniles being subjected to custodial interrogations without *Miranda* warnings, thus undermining the *Miranda* safeguards for individuals: "to *ensure* that the police do not coerce or trick captive suspects into confessing [and] to relieve the inherently compelling pressures generated by the custodial setting itself, which work to undermine the individual's will to resist." *Berkemer*, 468 U.S. at 433 (internal quotation marks omitted) (emphasis in original).

A. This Court has not definitively ruled on whether age may be considered in determining whether a juvenile suspect is in custody for *Miranda* purposes.

This Court has established a two-part test for determining whether a suspect was in custody for *Miranda* purposes: "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). In making this determination, courts must examine "all of the circumstances

surrounding the interrogation. *Stansbury v. California*, 511 U.S. 318, 325-26 (1994). This Court has repeatedly stressed that the test for *Miranda* custody is an objective one. *See, e.g., Keohane*, 516 U.S. at 112; *Stansbury*, 511 U.S. at 323; *Berkemer*, 486 U.S. at 430. In this objective test, the "relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Alvarado*, 541 U.S. at 662 (quoting *Berkemer*, 468 U.S. at 442).

This Court has never held that juvenile status – an objective fact – may not be a factor when considering "all of the circumstances" surrounding the interrogation or when inquiring how a person "in the suspect's position would have understood his situation." *Alvarado*, 541 U.S. at 673 (Breyer, J., dissenting). In fact, this Court has held that knowledge "concerning the unusual susceptibility of a defendant" may be a factor in the *Miranda* analysis. *Rhode Island v. Innis*, 446 U.S. 291, 302 n.8 (1980).

Prior to *Alvarado*, all jurisdictions that had addressed the issue of whether juvenile status may be relevant to the *Miranda* custody determination held that juvenile status was a proper consideration. *A.M. v. Butler*, 360 F.3d 787, 797 (7th Cir. 2004) ("age [of juvenile] is an important factor" in totality of the circumstances evaluation); *United States v. Erving L.*, 147 F. 3d 1240, 1248 (10th Cir. 1998) (evaluating whether "reasonable juvenile" would have believed he was not at liberty to terminate interview and leave); *In re Jorge D.*, 43 P.3d 605, 608-09 (Ariz. Ct. App. 2002) (objective test must include "additional elements that bear upon a child's perceptions and vulnerability, including the child's age"); *People v. T.C.*, 898 P.2d

20, 25 (Colo. 1995) (en banc) (applying a reasonable 11-year-old test); *Ramirez v. State*, 739 So. 2d 568, 574 (Fla. 1999) (applying "reasonable juvenile" standard to custodial analysis); *In re Doe*, 948 P.2d 166, 173 (Idaho Ct. App. 1997) (ruling that objective test for custody determination must include child's age); *People v. Braggs*, 810 N.E.2d 472, 507 (Ill. 2004) (considering age as a factor "analytically intertwined with the reasonable-person prong of the custodial question"); *State v. Smith*, 546 N.W.2d 916, 923 (Iowa 1996) (concluding that age was an appropriate consideration in making custody determination); *In re Joshua David C.*, 698 A.2d 1155, 1162 (Md. Ct. Spec. App. 1997) (stating that custody determination must consider juvenile's age); *Commonwealth v. A Juvenile*, 521 N.E.2d 1368, 1370 (Mass. 1988) (custody test is how "a reasonable person in the juvenile's position would have understood his situation"); *Evans v. Montana*, 995 P.2d 455, 459 (Mont. 2000) (examining whether "reasonable fourteen-year-old" would have felt free to leave); *In re Robert H.*, 194 A.D.2d 790, 791 (N.Y. App. Div. 1993) (considering whether "reasonable 15-year-old" would have believed he was free to leave); *In re Loredo*, 865 P.2d 1312, 1315 (Ore. Ct. App. 1993) (evaluating "whether a reasonable person in child's position" would have felt that he was in custody); *In re L.M.*, 993 S.W.2d 276, 288-89 (Tex. App. 1999) (adopting rule that "expressly provides for consideration of age under the reasonable-person standard"); *State v. D.R.*, 930 P.2d 350, 353 (Wash. Ct. App. 1997) (applying reasonable 14-year-old standard).

In *Alvarado*, this Court reversed the Ninth Circuit's holding that the California state court violated federal law when it failed to consider Alvarado's

juvenile status in its *Miranda* custody analysis. 541 U.S. at 668. This Court concluded that under the AEDPA, it was not an unreasonable application of federal law for the California court not to consider Alvarado's age in its *Miranda* custody analysis. *Id.* This Court concluded that the Ninth Circuit court "subsume[d] a subjective factor into an objective test. . . [when it] styled its inquiry as an objective test by considering what a 'reasonable 17-year-old, with no prior arrests or police interviews,' would perceive." *Id.* at 668. Thus, because such a formulation of the *Miranda* custody analysis might be seen as too subjective, this Court held that the state court "reached a reasonable conclusion." *Id.* at 668-69.

Interestingly, this Court explicitly held that even under a *de novo* review, consideration of a suspect's past law enforcement history would be improper because it would be too subjective and too difficult for police to know beforehand. *Id.* at 668. In contrast, this Court did not say whether consideration of a juvenile's age in a *Miranda* custody analysis would be improper under a *de novo* review. *Id.* at 665, 668.

Justice O'Connor concurred with the majority to state her belief that "[t]here may be cases in which a suspect's age will be relevant to the *Miranda* 'custody' inquiry." *Id.* at 669 (O'Connor, J., concurring). Because this Court's opinion in *Alvarado* was split 5-4, Justice O'Connor's concurrence created additional doubt regarding whether *Alvarado* precluded consideration of age in a *Miranda* custody analysis. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may

be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977).

B. The law is currently uncertain and unpredictable because state and federal courts are in conflict regarding whether, and how, age may be considered in the *Miranda* custody analysis.

In the years since this Court decided *Alvarado*, some courts have continued to consider age, either as a factor in the "totality of the circumstances" review or by analyzing whether a "reasonable juvenile" would have felt free to terminate the interview. Colorado, Nebraska, Ohio, Tennessee, and Texas, as well as the Fifth Circuit Court of Appeals, have explicitly considered age a relevant factor in the *Miranda* custody analysis. *See Murray v. Earle*, 405 F.3d 278, 287 (5th Cir. 2005) (holding that 11-year-old was in custody and distinguishing case from *Alvarado* "[t]he case of an eleven-year-old is different. The police should have no difficulty recognizing that their suspect is a juvenile"); *People v. Howard*, 92 P.3d 445, 450 (Colo. 2004) (court considered age because "a juvenile suspect . . . confronted with police questioning without the presence of a responsible adult . . . may not understand that he is not required to respond"); *In re C.H.*, 763 N.W.2d 708, 716 (Neb. 2009) (concluding that a 14-year-old interrogated at school by a police officer was in custody); *In re W.B. II*, No. 08CA18, 2009 Ohio App. LEXIS 1438, at *18 (Ct. App. 2009) ("a reasonable juvenile in W.B.'s position would not have understood that he was not in custody"); *In re R.H.*, No. 22352, 2008 Ohio App. LEXIS 672, at *11 (Ct. App. 2008) ("It is virtually impossible to conclude that a child of such tender years, 11, would appreciate the fact that he was simply free to leave and terminate

the interview"); *K.D.S. v. State*, 245 S.W.3d 356, 364 (Tenn. 2008) (affirming appeals court that considered juvenile's age in its custodial analysis).

After *Alvarado* was decided, two jurisdictions have questioned whether they may continue their historical practice of considering age in evaluating whether a juvenile was in custody. The Supreme Court of Iowa concluded that *Alvarado* called its prior practice into question. *State v. Ragan*, 774 N.W.2d 676, 681 (Iowa 2009) ("Previously, we . . . use[d] age as part of the analysis in determining a defendant's custodial status. However, subsequent[ly] . . . the Supreme Court decided *Yarborough v. Alvarado*, which questions whether age is a factor to consider under a federal constitutional analysis") (internal citations omitted). The Illinois Appellate Court has also departed from its practice of considering age in a custodial analysis. *People v. Crowe*, 883 N.E.2d 681, 689 (Ill. App. Ct. 2008) (given the "emphasis on objectiveness" in *Alvarado*, the court "declined to consider defendant's age [16] when determining whether he was in custody").

In addition to the Supreme Court of North Carolina, the Supreme Court of Wyoming and the District of Columbia Court of Appeals have concluded that *Alvarado* prohibits consideration of a juvenile suspect's age in a *Miranda* custody analysis. *In re J.F.*, 987 A.2d 1168, 1175-76 (D.C. 2010) (analyzing whether a 14-year-old interrogated at the police station for three hours was in custody, the court stated: "the suspect's age or experience is [not] relevant to the *Miranda* custody analysis"); *In re J.H.*, 928 A.2d 643, 650 (D.C. 2007) (declining to consider age in custody analysis of twelve-year-old interrogated by police at school); *United States*

v. Little, 851 A.2d 1280, 1285-86 (D.C. 2004) (citing *Alvarado*, the court conducted custody analysis "without regard to the fact that Little was a sixteen-year-old juvenile with no prior arrest record"). *In re C.S.C.*, 118 P.3d 970, 978 (Wyo. 2005) (citing *Alvarado*, the court concluded that it could not consider age in analyzing whether a 16-year-old was in custody when police interrogated him at school about an off-campus sexual assault).

This Court has repeatedly stressed the need for clarity regarding when *Miranda* warnings must be issued. *See, e.g., Berkemer*, 468 U.S. at 430-31. Although "totality of the circumstances" and "reasonable person" tests will always be fact-specific rather than "bright-line," the tests must provide guiding principles which law enforcement and trial courts can follow. Currently, in many jurisdictions, it would be seemingly impossible for law enforcement or trial courts to understand what the law is regarding which factors contribute to whether a juvenile is in custody. In short, neither of the purposes of the *Miranda* warnings – clarity for law enforcement and protection for individuals from coercion – is being achieved under the lower courts' current interpretations of *Alvarado*. Without clarification by this Court, the confusion and departure from established law will continue.

C. Failing to consider age in the *Miranda* custody analysis results in a skewed evaluation of the totality of the circumstances and whether a reasonable person would feel free to leave. Age is an objective fact and children are not the same as adults.

Juveniles are more susceptible to police coercion than adults. Over forty years ago, this Court "emphasized that admissions and confessions of juveniles

require special caution." *In re Gault*, 387 U.S. 1, 45 (1967). The Court noted that when

> a mere child — an easy victim of the law — is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year-old lad . . . is a ready victim of the inquisition. Mature men possibly might stand the ordeal . . . [b]ut we cannot believe that a lad of tender years is a match for the police in such a contest.

Id. (quoting *Haley v. Ohio*, 332 U.S. 596, 599-600 (1948)). Recent research indicates that children under the age of fifteen are substantially more likely to be intimidated by authority than are older adolescents and young adults. Thomas Grisso, et al., *Juveniles' Competence to Stand Trial: a Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 Law & Hum. Behav. 333, 363 (2003). Furthermore, because juveniles are "intensely oriented to the present," they are likely to experience interrogation "as a terminal point, something from which they will not be able to escape, even if an older individual subjected to the same circumstances might readily appreciate the transitory nature of the situation." Paul Holland, *Schooling Miranda: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 Loy. L. Rev. 39, 86 (2006).

The three jurisdictions that have held that age is not an appropriate consideration have modified the established *Miranda* analysis to exclude an important objective circumstance: the juvenile's age. These courts are applying the "reasonable person" standard without consideration that the person is a juvenile.

As the dissent in *J.D.B.* noted, what a reasonable 8-year-old perceives about whether he is free to terminate police questioning cannot be the same as what a reasonable 38-year-old under similar circumstances would believe. App. 13. However, applying an age-blind test dictates such an analysis.

Ignoring a juvenile's age in making the custody determination undermines the *Miranda* goal of protecting individuals from police coercion. This is especially true when a juvenile is interrogated at school. As the dissent in *J.D.B.* observed:

> In the school environment, where juveniles are faced with a variety of negative consequences — including potential criminal charges — for refusing to comply with the requests or commands of authority figures, the circumstances are inherently more coercive and require more, not less careful protection of the rights of juveniles.

App. 11. Additionally, at school the "student will not be in the presence of a parent, the figure most likely to have the inclination or ability to either arrange for the presence of counsel or to advise the youth to refuse to answer the officer's questions." Holland, at 85 n.175.

If courts are allowed to ignore the juvenile's age in determining whether he or she was in custody, juveniles will receive less protection under *Miranda* than adults do. In *Gault*, this Court recognized that Fifth Amendment rights apply equally to children. 387 U.S. at 55. Without guidance from this Court, lower courts may continue to erode the *Miranda* rights of juveniles, as the courts in North Carolina, Wyoming, and the District of Columbia have shown.

CONCLUSION

For the reasons stated herein, Petitioner respectfully requests that this Court issue a writ of certiorari to review the decision of the Supreme Court of North Carolina.

Respectfully submitted, this the 28th day of May, 2010.

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JOINT APPENDIX

No. 09-11121

Supreme Court, U.S.
FILED
DEC 16 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

J. D. B.,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 28, 2010
CERTIORARI GRANTED NOVEMBER 1, 2010

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APPENDIX A — CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

District Court, Orange County, North Carolina

19 October 2005	Juvenile Petition filed.
1 December 2005	Motion to Suppress Statements and Evidence filed.
13 December 2005	Hearing held on Motion to Suppress. Motion denied.
24 January 2006	Admission of delinquency by Juvenile. Trial court entered order adjudicating Juvenile delinquent and imposing disposition. Juvenile gave notice of appeal to North Carolina Court of Appeals.

North Carolina Court of Appeals

15 May 2007	Issued unpublished decision remanding to trial court for entry of findings of fact in support of its denial of Motion to Suppress.
4 June 2007	Judgment (mandate) of Court certified.

District Court, Orange County, North Carolina

16 October 2007	Pursuant to remand, trial court entered written findings of fact and

	conclusions of law denying Motion to Suppress.
1 November 2007	Juvenile gave notice of appeal to North Carolina Court of Appeals.

North Carolina Court of Appeals

7 April 2009	Divided panel issued opinion affirming denial of the Motion to Suppress.
27 April 2009	Judgment (mandate) of Court certified.

North Carolina Supreme Court

8 May 2009	Juvenile gave notice of appeal based on dissent in Court of Appeals.
11 December 2009	Issued opinion affirming decision of Court of Appeals.
31 December 2009	Judgment (mandate) of Court certified.

United States Supreme Court

16 March 2010	Juvenile filed application to extend the time to file a Petition for Writ of Certiorari from 31 March 2010 to 30 May 2010.

Appendix A

19 March 2010	Application granted by the Chief Justice extending the time to file until 28 May 2010.
28 May 2010	Juvenile filed Petition for Writ of Certiorari and Motion for Leave to Proceed In Forma Pauperis.
1 November 2010	Petition for Writ of Certiorari and Motion to Proceed In Forma Pauperis granted.

APPENDIX B — JUDGMENT IN THE SUPREME COURT OF NORTH CAROLINA DATED DECEMBER 31, 2009

IN THE SUPREME COURT
OF NORTH CAROLINA

190A09

In the Matter of: J.D.B.

Orange

IN THE MATTER OF:

J.D.B.,

Juvenile

appealed by Juvenile

From NC Court of Appeals

(08-499)

From Orange

(05JB115)

JUDGMENT

Appendix B

This cause came on to be argued upon the transcript of the record from the North Carolina Court of Appeals. Upon consideration whereof, this Court is of the opinion that there is no error in the record and proceedings of said Court of Appeals.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable Paul Newby, Associate Justice, be certified to the said North Carolina Court of Appeals to the intent that the judgment of the Court of Appeals is Affirmed.

And it is considered and adjudged further, that the costs of the appeal in this Court incurred, have been previously paid.

Certified to the North Carolina Court of Appeals, this the 31st day of December 2009.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina

By: /s/ Shaula Brannan
Assistant Clerk

APPENDIX C — DECISION OF THE NORTH CAROLINA SUPREME COURT FILED DECEMBER 11, 2009

IN THE MATTER OF J.D.B.

No. 190A09

FILED: 11 DECEMBER 2009

NEWBY, Justice.

This case presents the issue of whether a juvenile who made incriminating revelations to law enforcement officers was in police custody such that the officers should have afforded him the protections of N.C.G.S. § 7B-2101(a), which codifies and expands for the juvenile context the safeguards set forth in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Because we hold that the Court of Appeals properly concluded that the juvenile was not in custody when he incriminated himself, we affirm the decision of that court.

Two juvenile petitions were filed against the juvenile J.D.B. on 19 October 2005, each alleging one count of breaking and entering and one count of larceny. On 1 December 2005, counsel for J.D.B. filed a motion to suppress certain statements and evidence. After a hearing, the trial court entered an order denying the motion to suppress on 13 December 2005. The trial court did not make findings of fact or conclusions of law at that time. In a transcript of admission filed on 24 January

2006, J.D.B. admitted to all four counts alleged in the juvenile petitions of 19 October 2005, but renewed his objection to the denial of his motion to suppress. Also on 24 January 2006, the trial court entered an order adjudicating J.D.B. delinquent. J.D.B. appealed, *inter alia*, the denial of his motion to suppress.

The Court of Appeals remanded in pertinent part "to allow the trial court to make the findings of fact necessary to support its determination that [J.D.B.] was not in custody at the time he was questioned." *In re J.B.*, 183 N.C. App. 299, 644 S.E.2d 270, 2007 WL 1412457, at *5 (2007) (unpublished). On remand, the trial court entered an order on 16 October 2007 in which it made findings of fact and conclusions of law in support of its denial of J.D.B.'s motion to suppress. The trial court found as follows:

1. On September 24, 2005, [two homes in Chapel Hill] were broken into and various items were stolen, including jewelry [and] a digital camera.

2. [J.D.B.] at the time 13 years old, was interviewed by police on the same day as the break-ins after he was seen behind a residence in the same neighborhood.

3. It was later that the police were informed that [J.D.B.] had been seen in possession of a digital camera at school, which camera turned out to be the camera stolen [on September 24, 2005].

4. Investigator Joseph DiCostanzo of the Chapel Hill Police Department was assigned the investigation and went to the juvenile's school to speak with him.

5. [J.D.B.] is in the seventh grade and enrolled in special education classes.

6. [J.D.B.] was escorted from his class and into a conference room to be interviewed. Present in the room were Investigator DiCostanzo, Assistant Principal David Lyons, a school resource officer and an intern. The door was closed, but not locked.

7. [J.D.B.] was not administered Miranda warning[s] and was not offered the opportunity to speak to a parent or guardian prior to the commencement of questioning. Additionally, no parent or guardian was contacted prior to [J.D.B.]'s removal from class.

8. Investigator DiCostanzo asked [J.D.B.] if he would agree to answer questions about recent break-ins. [J.D.B.] consented.

9. [J.D.B.] stated that he had been in the neighborhood looking for work mowing lawns and initially denied any criminal activity.

10. Mr. Lyons then encouraged [J.D.B.] to "do the right thing" and tell the truth.

11. The investigator questioned him further and confronted him with the fact that the camera had been found.

12. Upon [J.D.B.]'s inquiry as to whether he would still be in trouble if he gave the items back, the investigator responded that it would be helpful, but that the matter was still going to court and that he may have to seek a secure custody order.

13. [J.D.B.] then confessed to entering the houses and taking certain items together with another juvenile.

14. The investigator informed [J.D.B.] that he did not have to speak with him and that he was free to leave. He asked him if [he] understood that he was not under arrest and did not have to talk with the investigator.

15. [J.D.B.] indicated by nodding "yes" that he understood that he did not have to talk to the officer and that he was free to leave. He continued to provide more details regarding where certain items could be located.

16. [J.D.B.] wrote a statement regarding his involvement in the crime.

17. The bell rang signaling the end of the day and [J.D.B.] was allowed to leave to catch his bus home.

18. The interview lasted from 30 to 45 minutes.

19. The investigator had informed [J.D.B.] that he would see him later and would be speaking to his grandmother and aunt.

20. Investigator DiCostanzo and Officer Hunter went to the home of [J.D.B.], but found no one home. When [J.D.B.] arrived, he told the officers they could look around and he would show them where the jewelry was located.

21. Investigator DiCostanzo informed [J.D.B.] that he needed to obtain a search warrant and left Officer Hunter to wait outside [J.D.B.]'s home.

22. While awaiting the search warrant, [J.D.B.] brought a ring to the officer from inside the home.

23. Upon the investigator's return with the warrant, [J.D.B.] entered the home with the officers and handed them several stolen items and led the investigator to where other items could be found on the roof of a gas station down the road. During the entire time that the officers were at his residence and travelling with him to the BP station, no parent or guardian was contacted or advised of the situation. [J.D.B.] was not advised of his Miranda warnings or told he had the right to speak to or have a parent or guardian present.

24. Investigator DiCostanzo left his card and a copy of the search warrant at [J.D.B.]'s residence.

25. All of [J.D.B.]'s responses to the officer's questions were appropriately responsive, indicating that he was capable of understanding the fact that he did not have to answer questions.

26. All of [J.D.B.]'s responses to counsel during the suppression hearing were appropriately responsive.

J.D.B. again appealed the denial of his motion to suppress. The Court of Appeals affirmed the decision of the trial court, concluding that "J.D.B. was not in custody during his interactions with officers." *In re J.D.B.*, ___ N.C. App. ___, ___, 674 S.E.2d 795, 800 (2009). J.D.B. then appealed as of right to this Court on the basis of the dissenting opinion in the Court of Appeals, which would have held that J.D.B. was in custody when he incriminated himself to police officers. *Id.* at ____, 674 S.E.2d at 801 (Beasley, J., dissenting). The dissenting judge opined, "[T]hat J.D.B. was a middle school aged child is certainly among the circumstances relevant to" whether J.D.B. was in custody. *Id.* at ____, 674 S.E.2d at 802 (citing *State v. Buchanan*, 353 N.C. 332, 339-40, 543 S.E.2d 823, 828 (2001)).

We begin our review by noting that the trial court's findings of fact are uncontested and therefore, binding on this Court. *E.g., Koufman v. Koufman*, 330 N.C. 93,

97, 408 S.E.2d 729, 731 (1991) (citations omitted). Our consideration is limited to de novo review of the trial court's conclusions of law. *State v. Wilkerson*, 363 N.C. 382, 430, 683 S.E.2d 174, 203 (2009) (citing *State v. Hyatt*, 355 N.C. 642, 653, 566 S.E.2d 61, 69 (2002), *cert. denied*, 537 U.S. 1133, 123 S. Ct. 916, 154 L. Ed. 2d 823 (2003)).

J.D.B. argues that he was in police custody when he incriminated himself and thus, that his rights were violated when he was interrogated without proper warnings under *Miranda* and N.C.G.S. § 7B-2101(a). The United States Supreme Court held in *Miranda*

> that *when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way* and is subjected to questioning, the [Fifth Amendment] privilege against self-incrimination is jeopardized.... [The individual] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

384 U.S. at 478-79, 86 S. Ct. at 1630, 16 L. Ed. 2d at 726 (emphasis added). For the juvenile setting, our General Statutes codify and enhance the protections required under *Miranda*:

Appendix C

(a) Any juvenile *in custody* must be advised prior to questioning:

> (1) That the juvenile has a right to remain silent;
>
> (2) That any statement the juvenile does make can be and may be used against the juvenile;
>
> (3) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and
>
> (4) That the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.

N.C.G.S. § 7B-2101(a) (2007) (emphasis added).

The protections of *Miranda* and section 7B-2101(a) apply only to custodial interrogations by law enforcement. "'[I]n determining whether a suspect [is] in custody, an appellate court must examine all the circumstances surrounding the interrogation; but the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest.'" *Buchanan*, 353 N.C. at 338, 543 S.E.2d at 827 (second alteration in original)

(quoting *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405, *cert. denied*, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997)). This inquiry requires application of "an objective test as to whether a reasonable person in the position of the defendant would believe himself to be in custody or that he had been deprived of his freedom of action in some significant way." *State v. Greene*, 332 N.C. 565, 577, 422 S.E.2d 730, 737 (1992) (citations omitted). Notably, the inquiry as to "'whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest,'" *Buchanan*, 353 N.C. at 338, 543 S.E.2d at 827 (quoting *Gaines*, 345 N.C. at 662, 483 S.E.2d at 405), is not equivalent to the broader "free to leave" test that "has long been used for determining, under the Fourth Amendment, whether a person has been *seized*," *id.* at 339, 543 S.E.2d at 828 (emphasis added) (citing *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497, 509 (1980)). "Circumstances supporting an objective showing that one is 'in custody' might include a police officer standing guard at the door, locked doors or application of handcuffs." *Id.* at 339, 543 S.E.2d at 828.

The uniquely structured nature of the school environment inherently deprives students of some freedom of action. However, the typical restrictions of the school setting apply to all students and do not constitute a "significant" deprivation of freedom of action under the test set forth in *Greene*, 332 N.C. at 577, 422 S.E.2d at 737. For a student in the school setting to be deemed in custody, law enforcement must subject

the student to "'restraint on freedom of movement'" that goes well beyond the limitations that are characteristic of the school environment in general. *Buchanan*, 353 N.C. at 338, 543 S.E.2d at 827 (quoting *Gaines*, 345 N.C. at 662, 483 S.E.2d at 405).

In the instant case, J.D.B. was escorted from class to a conference room, where Investigator DiCostanzo was present along with an assistant principal, one of the assistant principal's interns, and the school resource officer. The school resource officer's minimal participation in the questioning of J.D.B. did not render that questioning custodial in nature. *See In re W.R.*, 363 N.C. 244, 248, 675 S.E.2d 342, 344 (2009) (stating in circumstances similar to those in the instant case: "[W]e are not prepared. . .to conclude that the presence and participation of the school resource officer . . . rendered the questioning of respondent juvenile a 'custodial interrogation,' requiring *Miranda* warnings and the protections of N.C.G.S. § 7B- 2101."). Moreover, there is no indication in the trial court's findings that J.D.B. was restrained in any way or that anyone stood guard at the conference room door. "The door was closed, but not locked." By asking J.D.B. "if he would agree to answer questions about recent break-ins," Investigator DiCostanzo indicated that J.D.B. was not required to do so. Investigator DiCostanzo began his questions only after J.D.B. said he was willing to answer. After J.D.B. "initially denied any criminal activity," Investigator DiCostanzo informed J.D.B. that the stolen digital camera had been recovered. J.D.B. then asked "whether he would still be in trouble if he gave the items back."

and Investigator DiCostanzo responded that, although the matter was "going to court" regardless, J.D.B.'s cooperation "would be helpful." It was then that J.D.B. "confessed to entering the houses and taking certain items together with another juvenile." Upon objective consideration of the totality of the circumstances surrounding J.D.B.'s confession, we determine that there were not sufficient "indicia of formal arrest" to justify a conclusion that J.D.B. "had been formally arrested or had had his freedom of movement restrained to the degree associated with a formal arrest." *Id.* (citing *Buchanan*, 353 N.C. at 338-40, 543 S.E.2d at 827-28).

Immediately following J.D.B.'s initial confession, Investigator DiCostanzo "informed [J.D.B.] that he did not have to speak with him and that he was free to leave. He asked him if [he] understood that he was not under arrest and did not have to talk with the investigator," and J.D.B. "indicated by nodding 'yes' that he understood." After J.D.B. acknowledged that he understood he was not under arrest and was free to leave, J.D.B. continued to provide information about the break-ins and "wrote a statement regarding his involvement in the crime." After the interview, which "lasted from 30 to 45 minutes," J.D.B. left the conference room without hindrance. *See Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 714, 50 L. Ed. 2d 714, 719 (1977) (per curiam) (in which the Supreme Court of the United States determined that a suspect was not in custody when his freedom to leave the police station to which he had come voluntarily was not "restricted in any way" and the suspect "did in fact leave the police

station without hindrance"). Later that same day, Investigator DiCostanzo and another police officer accompanied J.D.B. as he willingly located and surrendered numerous stolen items. The trial court's findings of fact with respect to this later encounter (numbered 19-24) contain insufficient indicia of "'restraint on [J.D.B.'s] freedom of movement of the degree associated with a formal arrest'" to support a conclusion that J.D.B. was in police custody. *Buchanan*, 353 N.C. at 338, 543 S.E.2d at 827 (quoting *Gaines*, 345 N.C. at 662, 483 S.E.2d at 405).

J.D.B. argues, as did the dissenting judge in the Court of Appeals, that the inquiry into whether he was in custody should take into consideration J.D.B.'s age and his status as a special education student. This Court has not accounted for such matters in conducting the proper custody inquiry in the past. In the recent case of *In re W.R.*, for example, we considered whether the questioning of a fourteen-year-old juvenile was custodial in nature. 363 N.C. at 246-48, 675 S.E.2d at 343-44. In reversing the Court of Appeals' holding that the juvenile was in custody, we applied the objective "reasonable person" standard, *id.* at 248, 675 S.E.2d at 344 (citing *Buchanan*, 353 N.C. at 338-40, 543 S.E.2d at 827-28), and at no point did we consider the juvenile's age.

We reiterate that the custody inquiry is "an objective test as to whether a reasonable person in the position of the defendant would believe himself to be in custody or that he had been deprived of his freedom of action in some significant way." *Greene*, 332 N.C. at 577,

422 S.E.2d at 737 (citations omitted). While "[w]e have consistently held that a defendant's subnormal mental capacity is a factor to be considered when determining whether a *knowing and intelligent waiver of rights* has been made," *State v. Fincher*, 309 N.C. 1, 8, 305 S.E.2d 685, 690 (1983) (emphasis added) (citations omitted), subjective mental characteristics are not relevant regarding whether "a *reasonable* person" would believe he had been placed under the equivalent of a formal arrest, *Greene*, 332 N.C. at 577, 422 S.E.2d at 737 (emphasis added). This Court adheres to the view that "the custody inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect's individual characteristics—including his age—could be viewed as creating a subjective inquiry." *Yarborough v. Alvarado*, 541 U.S. 652, 668, 124 S. Ct. 2140, 2151-52, 158 L. Ed. 2d 938, 954 (2004) (citing *Mathiason*, 429 U.S. at 495-96, 97 S. Ct. at 714, 50 L. Ed. 2d at 719).[1] Under the circumstances of the case *sub judice*, we decline to extend the test for custody to include consideration of the age and academic standing of an individual subjected to questioning by police.

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1. We are aware that *Alvarado* is not binding on this Court because the Supreme Court of the United States merely held in that case that "[t]he state court considered the proper factors and reached a reasonable conclusion" and, thus, that an application for a writ of habeas corpus under 28 U.S.C. § 2254(d)(1) should not have been granted. 541 U.S. at 669, 124 S. Ct. at 2152, 158 L. Ed. 2d at 954. We nonetheless consider *Alvarado* persuasive.

Appendix C

Because we conclude that J.D.B. was not in custody when he incriminated himself to the police, we hold that he was not entitled to the protections of N.C.G.S. § 7B-2101(a) and *Miranda v. Arizona*. The Court of Appeals did not err in affirming the trial court's denial of J.D.B.'s motion to suppress. Therefore, the decision of the Court of Appeals is affirmed.

AFFIRMED.

Justice BRADY dissenting.

The issue in this case is whether J.D.B., a thirteen-year old special education student at Smith Middle School in Chapel Hill, North Carolina, was significantly deprived of his freedom of movement and thus entitled to the protections of the Fifth Amendment of the United States Constitution and N.C.G.S. § 7B- 2101(a) before being interrogated by law enforcement officers and school officials in a closed conference room of the middle school. The majority's conclusion stands in stark contrast to our State's public policy of aiding, supporting, and protecting juveniles. The manner in which school officials and law enforcement interrogated J.D.B. more resembles hunters carefully and selectively targeting their prey than a fair juvenile investigation consistent with our General Statutes. Because I believe the Juvenile Code affords heightened protections against self-incrimination to juveniles, especially in the restrictive environment of a public middle school, I respectfully dissent.

Appendix C

Tension has long existed between the interests of law enforcement in conducting efficient criminal investigations and the individual's constitutional right against self-incrimination. Throughout American history the "incommunicado" nature of police investigations has led to the use of physical violence and psychological coercion to elicit criminal confessions. *See Miranda v. Arizona*, 384 U.S. 436, 445-46 (1966). In response to these abuses, the Supreme Court of the United States decision in *Miranda v. Arizona* unequivocally established that law enforcement officers must administer specific warnings "to protect an individual's Fifth Amendment right against self-incrimination in the inherently compelling context of custodial interrogations by police officers." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (citing *Miranda*, 384 U.S. 436). The North Carolina General Assembly has taken additional steps to protect a juvenile's right against self-incrimination in the North Carolina Juvenile Code, which provides that before custodial questioning, a juvenile must be advised:

> (1) That [he] has the right to remain silent;
>
> (2) That any statement [he] does make can be and may be used against [him];
>
> (3) That [he] has a right to have a parent, guardian, or custodian present during questioning; and
>
> (4) That [he] has a right to consult with an attorney and that one will be appointed for [him] if [he] is not represented and wants representation.

N.C.G.S. § 7B-2101(a) (2007).

Appendix C

An individual is entitled to *Miranda* warnings and the protections of N.C.G.S. § 7B-2101 when it is apparent from the *"totality of the circumstances"* that there is a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *State v. Garcia*, 358 N.C. 382, 399-400, 597 S.E.2d 724, 738 (2004) (citations and internal quotation marks omitted), *cert. denied*, 543 U.S. 1156 (2005). The primary inquiry is "'whether a *reasonable person in defendant's position*, under the totality of the circumstances, would have believed that he was under arrest or was restrained in his movement to the degree associated with a formal arrest.'" *State v. Barden*, 356 N.C. 316, 337, 572 S.E.2d 108, 123 (2002) (emphasis added) (quoting *Buchanan*, 353 N.C. at 339-40, 543 S.E. 2d at 828), *cert. denied*, 538 U.S. 1040 (2003).

Ultimately, the analysis in the instant case hinges upon whether defendant's age should be taken into consideration under the reasonable person standard when analyzing the circumstances surrounding the interrogation. The majority contends that *Yarborough v. Alvarado*, 541 U.S. 652 (2004), should persuade this Court to not consider the age of the subject under the reasonable person standard. In *Alvarado*, the Supreme Court of the United States ruled that "[t]he *Miranda* custody inquiry is an *objective* test," *id.* at 667, and because "consideration of a suspect's individual characteristics—including his age—could be viewed as creating a subjective inquiry," *id.* at 668, age was irrelevant to a reasonable person's belief in a *Miranda* custody analysis. *Id. Alvarado* is not controlling in an

analysis of N.C.G.S. § 7B-2101. *See State v. Smith*, 317 N.C. 100, 106, 343 S.E.2d 518, 521 (1986) ("In resolving [issues under N.C.G.S. § 7A-595] . . . cases decided under the fifth and sixth amendments to the United States Constitution are not controlling . . . .") *overruled in part on other grounds by Buchanan*, 353 N.C. at 340, 543 S.E.2d at 828. When analyzing N.C.G.S. § 7A-595, the predecessor provision of the Juvenile Code governing juvenile interrogations, this Court *has* found it appropriate to consider the subject's age under the reasonable person standard of the *Miranda* "in custody" analysis.[2] In *State v. Smith* this Court considered whether a sixteen year old was subjected to a custodial interrogation under N.C.G.S. § 7A-595. *Id.* at 102-08, 343 S.E.2d at 519-22. After considering the totality of the circumstances, including the length of the questioning and the constant presence of armed law enforcement officers, this Court determined that a person of "defendant's age and experience" would have believed he was in custody. *Id.* at 105, 343 S.E.2d at 520. Thus, the age of the defendant was a key consideration in determining whether a reasonable juvenile would have believed he was "in custody" under N.C.G.S. § 7A-595.

By failing to consider age, the majority's reasonable person standard is too rigid to apply to provisions of the Juvenile Code. It is logical that age should be

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2. N.C.G.S. § 7A-595 formerly governed juvenile interrogations and its provisions are nearly identical to the current N.C.G.S. § 7B-2101. *See* N.C.G.S. § 7A-595 (1986).

considered as part of the reasonable person standard in a custody analysis under N.C.G.S. § 7B-2101. The many noble goals of the Juvenile Code include "protect[ing] the constitutional rights of juveniles" and their families and "provid[ing] uniform procedures that assure fairness and equity." N.C.G.S. § 7B-1500(4) (2007). The entire Code was created to ensure unique services for juveniles because of the special circumstances inherent in their youth; to ignore age when interpreting any section of the Juvenile Code defies common sense and the very purpose of the Code.

Furthermore, a defendant's age is often considered throughout our jurisprudence and General Statutes. For example, under civil common law, there is a rebuttable presumption that juveniles between the ages of seven and fourteen are incapable of contributory negligence, and children under seven are "conclusively presumed to be incapable of contributory negligence." *See Welch v. Jenkins*, 271 N.C. 138, 142, 155 S.E.2d 763, 766 (1967) (citations omitted). In the criminal context, those under the age of six cannot be charged with a crime. *See* N.C.G.S. § 7B-1501(7) (2007). In North Carolina we have a separate juvenile court for youthful offenders; jurisdiction can be transferred to a superior court only if the juvenile is at least thirteen years old when the alleged felony was committed, if the juvenile has received proper notice and a hearing, and probable cause has been found. *Id.* § 7B-2200 (2007). Additionally, the Supreme Court of the United States has ruled that the Eighth Amendment forbids imposition of the death penalty on offenders under the age of eighteen when

their crimes were committed. *Roper v. Simmons*, 543 U.S. 551, 578 (2005). The rationale behind these laws is practical and just. The perceptions, cognitive abilities, and moral development of juveniles are different from those of adults; thus, the law rightly takes this into account when dealing with juvenile offenders. The majority's failure to consider J.D.B's juvenile status in its reasonable person standard runs contrary to our established juvenile jurisprudence.

Furthermore, the arguments for excluding consideration of age under the reasonable person standard outlined in *Alvarado* are not present in the instant case. *Alvarado's* rationale for excluding age from a custody inquiry was to "give clear guidance to the police," 541 U.S. at 668, so that law enforcement officers are not forced to "anticipat[e] the frailties or idiosyncra[s]ies of every person whom they question," *id.* at 667 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 442 n.35 (1984) (alterations in original) (internal quotation marks omitted)). Here, the difficulty of guessing defendant's age is nonexistent. Investigator DiCostanzo sought out J.D.B. at a middle school, where he knew J.D.B. was a seventh-grade student. All seventh graders are juveniles, roughly between the ages of twelve and fourteen, and as Investigator DiCostanzo testified, he was able to obtain J.D.B.'s exact age from school records. Therefore, defendant's "frailty"—his youth—was evident from the very location Investigator DiCostanzo selected to conduct the interrogation. Additionally, Investigator DiCostanzo was a *juvenile* investigator with the Chapel Hill Police Department,

specially trained in dealing with juveniles and educated in laws concerning their rights. The Chapel Hill Police Department Policy Manual explicitly states:

> *Even if the juvenile is not in custody*, it is good practice to have him sign a Miranda Rights waiver form before issuing a statement. If the juvenile does not sign a waiver, the officer must document that the juvenile is told that he is not under arrest and free to leave at any time, and that he agreed to talk.

Chapel Hill Police Dep't, Policy Manual No. 2-12 (*Juvenile Response*), at 4 (Dec. 15, 2006 (revised)) (emphasis added). In order to protect J.D.B.'s rights and fulfill the purpose of the Juvenile Code, Investigator DiCostanzo should have read J.D.B. his rights under N.C.G.S. § 7B-2101 before soliciting any statement, just as the Chapel Hill police Department Policy Manual advises.

Because consideration of a subject's youth is particularly pertinent in analyzing any provision of the Juvenile Code, especially when doing so creates no undue burden on law enforcement officers, the proper inquiry in the instant case when determining whether defendant was in custody for the purposes of N.C.G.S. § 7B-2101 should be whether, under the totality of the circumstances, a reasonable juvenile in defendant's position would have believed he was under formal arrest or was restrained in his movement to the degree associated with a formal arrest. The majority concludes

that there were not sufficient "indicia of formal arrest" to conclude that J.D.B. was in custody because the findings of fact do not indicate that J.D.B. was physically restrained or that the conference room door was guarded or locked. While it is true that handcuffs were never applied to J.D.B. and the closed door of the room where he was detained was not locked, this does not mean he was not restrained. The majority's analysis ignores the Court's obligation to consider the totality of the circumstances and "the unique facts surrounding each incriminating statement." *Garcia*, 358 N.C. at 399, 597 S.E.2d at 738 (citations omitted). An examination of the totality of the circumstances leads to the conclusion that a reasonable juvenile in J.D.B.'s position would have believed he was restrained in his movement to the degree associated with a formal arrest.

First, the location of the interrogation must be considered. In any planned interrogation, law enforcement carefully chooses the location before questioning begins. The gold standard in enhanced interrogation preparation and training, utilized by both the Central Intelligence Agency and the Federal Bureau of Investigation, is the Army Field Manual on Human Intelligence Collector Operations. The Manual states:

> When conducting . . . operations, the location of the questioning will have psychological effects on the source. The questioning location should be chosen and set up to correspond to the effect that the [officer] wants to project and his planned approach

> techniques. For example, meeting in a social type situation such as a restaurant may place the source at ease. Meeting in an apartment projects informality while meeting in an office projects more formality. Meeting at the source's home normally places him at a psychological advantage, while meeting in the [officer's] work area gives the [officer] a psychological edge.

U.S. Dep't of the Army, Field Manual 2-22.3, *Human Intelligence Collector Operations* para. 7-12 (Sept. 6, 2006). As a trained investigator would know, the location of the interrogation in the instant case certainly would have a psychological effect on a reasonable person in J.D.B.'s position. A middle school is a restrictive environment. Unlike a university campus, where people may freely come and go, middle school students are not free to leave the campus without permission, and visitors to the school, including parents and guardians of students, must upon arrival report their presence and receive permission to be at the facility. Moreover, students at middle schools are instructed to obey the requests and directives of adults. The Student Handbook at Smith Middle School, where J.D.B. attended, instructs students to "[f]ollow directions of all teachers/adults the first time they are given," "[s]top moving when an adult addresses" them, and "[w]alk away only after the adult has dismissed" them.

Law enforcement in the instant case took advantage of the middle school's restrictive environment and its

psychological effect by choosing to interrogate J.D.B. there, instead of at his home or in any other public, more neutral location. Certainly, if the larceny J.D.B. was suspected of committing had occurred on school grounds, law enforcement might understandably investigate suspects there, at the scene of the crime. However, the larceny in question occurred in a residential subdivision, not on the school campus. Law enforcement investigators could have first attempted to question J.D.B. at his residence. Instead, the school was selected as the interrogation site, a location where any reasonable juvenile in J.D.B.'s position would not only be at a psychological disadvantage, but where he would be defenseless, without the protection of a parent or guardian. It is troubling that in the instant case a public middle school, which should be an environment where children feel safe and protected, became a place where a law enforcement investigator claimed a tactical advantage over a juvenile.

Not only was J.D.B., or any reasonable juvenile in his position, at a disadvantage because of the location of the interrogation, but also by the manner in which it was conducted. J.D.B. was sitting in a classroom with his peers when the class was suddenly interrupted by Officer Gurley, Smith Middle School's resource officer. Officer Gurley removed J.D.B. from the classroom and escorted him to a school conference room. J.D.B. could have been asked by his teacher or any other school official to report to the conference room; instead, he was escorted by a uniformed, armed police officer. The only logical reason for Officer Gurley to escort J.D.B. was to

restrain his freedom of movement; J.D.B. had no choice but to comply with his removal from the classroom and Officer Gurley's instructions to walk to the conference room. If J.D.B. had refused to accompany Officer Gurley he likely would have faced disciplinary action from the school.[3] Therefore, J.D.B.'s freedom of movement was restricted from the moment he was removed from his classroom by Officer Gurley.

When J.D.B. arrived at the conference room, he was met by three other authoritative adults: Mr. Lyons, the school assistant principal; Mr. Benson, an intern with the school; and Investigator DiCostanzo of the Chapel Hill Police Department. J.D.B. was directed to take a seat at a conference table and the door to the office was closed. Investigator DiCostanzo was not in uniform, but dressed in a suit jacket and tie, and he introduced himself to J.D.B. as a juvenile investigator. That a special investigator from the police department, dressed in business attire, was making a special trip to the school would alert any reasonable middle school student that

3. Additionally, amici argue that refusal to follow an order given by a school official can ultimately lead to criminal charges under N.C.G.S. § 14-288.4, which provides that a person who willfully engages in disorderly conduct by "[d]isrupt[ing], disturb[ing] or interfer[ing] with the teaching of students . . . or disturb[ing] the peace, order or discipline at any . . . educational institution" is "guilty of a Class 2 misdemeanor." N.C.G.S. § 14-288.4 (a) (6) (2007). Under N.C.G.S. § 115C-378 (2007) parents can also be prosecuted for violating the Compulsory Attendance Law if their children fail to attend school.

something serious was taking place, something more than a casual conversation about joining the Police Athletic League or participating in the Youth Partnership for Crime Prevention.

With these facts alone, there is enough evidence to conclude that a reasonable juvenile in J.D.B.'s position would have believed he was restrained in his movement to the degree associated with a formal arrest. The majority states that "[f]or a student in the school setting to be deemed in custody, law enforcement must subject the student to 'restraint on freedom of movement' that goes well beyond the limitations that are characteristic of the school environment in general." If removal from a middle school classroom and being physically escorted by a uniformed, armed police officer to a closed conference room inhabited by four authoritative adults does not qualify as procedures that go well beyond the "typical restrictions" of a "school environment in general," it is hard to imagine any set of circumstances that the majority would label as a sufficient restraint on movement.

At this point in the interrogation, as noted above, the Chapel Hill Police Department Policy Manual instructs that before any questioning began, Investigator DiCostanzo should have informed J.D.B. of his rights under N.C.G.S. § 7B-2101. Had Investigator DiCostanzo simply followed the Manual, this case likely would not be before us. Instead, Investigator DiCostanzo immediately began the interrogation. J.D.B. was never told he was free to leave or that he was entitled

to have a parent, guardian, or attorney present. When Investigator DiCostanzo began questioning J.D.B. about the larceny, J.D.B. denied any involvement. Yet, Assistant Principal Lyons urged J.D.B. to "do the right thing" and tell the truth. Investigator DiCostanzo continued to pressure J.D.B. to talk by confronting him with information that a stolen camera had been found. Still, at this point no one had advised J.D.B. of his rights. When J.D.B. inquired of Investigator DiCostanzo what would happen if the stolen items were returned, Investigator DiCostanzo replied that it would be helpful, but the matter would still have to go to court. Next, Investigator DiCostanzo informed J.D.B. that he might be forced to obtain a secure custody order for J.D.B. unless it was apparent that J.D.B. was not going to steal again. Investigator DiCostanzo explained to J.D.B. that a secure custody order would give law enforcement the right to hold J.D.B. in juvenile detention.[4]

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4. A juvenile held under a secure custody order is entitled to far fewer protections than an adult taken into custody. Once an adult defendant is taken into police custody he is required to be brought before a magistrate for a hearing "without unnecessary delay" pursuant to N.C.G.S. § 15A-501 (2007). At this appearance, the magistrate must release the defendant in accordance with Article 26 of Chapter 15A, or commit the defendant to a detention facility pursuant to N.C.G.S. § 15A-521, pending further proceedings in the case. *Id.* § 15A- 511(e) (2007). After appearing before a magistrate, an adult criminal defendant must be brought before a district court judge for an initial appearance within 96 hours of being taken into custody to determine the sufficiency of the charges against the defendant and to inform the defendant of his rights, including the right against self-incrimination and the right to counsel. (Cont'd)

To a reasonable person in J.D.B.'s position, this remark certainly qualifies as an indicium of formal arrest. Moreover, Investigator DiCostanzo's statement was nothing short of a veiled threat that J.D.B. would be physically detained unless he confessed. At this point, J.D.B. had already denied any involvement in the larceny, yet he was not permitted to leave; rather, he was encouraged to "do the right thing" and threatened with juvenile detention. A reasonable middle school student in J.D.B.'s position, after being physically escorted by a uniformed, armed officer to a closed conference room with four authoritative adults, would have considered himself to be physically restrained to the point of formal arrest. Moreover, under school policy, J.D.B. was not free to leave until he was dismissed by an adult. Furthermore, Investigator DiCostanzo, a special juvenile investigator with the Chapel Hill Police Department, threatened to hold J.D.B. in juvenile

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(Cont'd)

Id. §§ 15A-601 to 604 (2007). The district court judge is also required to review the defendant's eligibility for release pursuant to Article 26 Chapter 15A, and to schedule a probable cause hearing for the defendant, unless the right to such hearing is waived. *Id.* §§ 15A-605 to 606 (2007). Further, if a grand jury returns a bill of indictment "as not a true bill, the presiding judge must immediately examine the case records to determine if the defendant is in custody or subject to bailor conditions of pretrial release." *Id.* § 15A-629 (2007). Unlike these procedures afforded to adult defendants, which ensure hearings for pretrial release are held immediately, juveniles who are held under secure custody orders can be detained for up to five calendar days before receiving a hearing on the merits to determine the need for continued custody. *See id.* § 7B-1906 (2007).

detention unless he divulged all his knowledge of the larceny. The totality of these circumstances leads to no other conclusion than that J.D.B. was "in custody."

Not surprisingly, after Investigator DiCostanzo's threat of a secure custody order, J.D.B. made incriminating statements linking him to the larceny. When J.D.B. made these statements he had not been advised of his rights. Investigator DiCostanzo's subsequent statements informing J.D.B. that he did not have to answer any questions and that he was free to leave are therefore irrelevant to this analysis. What these statements in fact do is exhibit crafty and highly questionable investigative tactics. Investigator DiCostanzo's warning was too little, too late, after J.D.B.'s constitutional rights had been circumvented.

The Standards Manual of the Law Enforcement Agency Accreditation Program states: "When dealing with juveniles, law enforcement officers should always make use of the least coercive among reasonable alternatives, consistent with preserving public safety, order, and individual liberty." Comm'n on Accreditation for Law Enforcement Agencies, Inc., *Standards for Law Enforcement Agencies* ch. 44 *(Juvenile Operations)*, at 44-1 (4th ed. Jan. 1999). The actions of law enforcement in the instant case are inconsistent with these standards and evince a disregard for the protection of juvenile rights. It is disheartening and alarming that today's majority opinion condones the highly coercive actions of law enforcement in the instant case, which will only encourage law enforcement to disregard the provisions

and procedures of N.C.G.S. § 7B-2101 in the future. Even radical Muslims suspected of terrorism are afforded broader constitutional protections than the majority wishes to give juveniles in J.D.B.'s position. *Cf. Boumediene v. Bush*, ___ U.S. ____, 128 S. Ct. 2229 (2008) (holding that alien enemy combatants detained at the U.S. Naval Station in Guantanamo Bay, Cuba, are entitled to certain constitutional privileges). The overriding goal of North Carolina's Juvenile Code is to protect the constitutional rights and best interests of juveniles and their families. Today's majority opinion is inconsistent with this goal. I would hold that because a reasonable person in *J.D.B.*'s position was in custody for the purposes of N.C.G.S. § 7B-2101, our state laws entitled *J.D.B.* to be informed of his rights before the interrogation began. Accordingly, I respectfully dissent.

Justice HUDSON dissenting.

Because I believe the trial court's conclusions of law reflect an incorrect application of the law to the facts found, I respectfully dissent. "The determination of whether an interrogation is conducted while a person is in custody involves reaching a conclusion of law. While this conclusion may rest upon factual findings, it is a legal conclusion, fully reviewable, and not a finding of fact." *State v. Greene*, 332 N.C. 565, 577, 422 S.E.2d 730, 737 (1992) (citation omitted).

> Accordingly, ... we review the trial court's conclusions of law for legal accuracy and to

> ensure that those conclusions reflect[] a correct application of [law] to the facts found. In doing so, this Court must look first to the circumstances surrounding the interrogation and second to the effect those circumstances would have on a reasonable person.

State v. Garcia, 358 N.C. 382, 391, 597 S.E.2d 724, 733 (2004) (second and third alterations in original) (citations and internal quotation marks omitted), *cert. denied*, 543 U.S. 1156, 161 L. Ed. 2d 122 (2005).

"In *Miranda*, the Supreme Court defined 'custodial interrogation' as 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any *significant* way.'" *State v. Buchanan*, 353 N.C. 332, 337, 543 S.E.2d 823, 826 (2001) (quoting *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966)). "[I]n determining whether a suspect [is] in custody, an appellate court must examine all the circumstances surrounding the interrogation; but the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest." *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405 (citation omitted), *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997). "The test for determining whether a person is in custody is an objective test as to whether a reasonable person in the position of the defendant would believe himself to be in custody or that he had been deprived of his freedom of action in some significant way." *Greene*, 332 N.C. at 577, 422 S.E.2d at 737 (citations omitted).

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Here, the trial court determined that J.D.B. was not subjected to custodial interrogation when he was questioned at Smith Middle School. In doing so, the trial court made the following pertinent conclusions of law, which were challenged on appeal:

> 1. [J.D.B.] was not in custody when he was brought to the conference room to speak to . . . [I]nvestigator [DiCostanzo].
>
> 2. The mere presence of . . . [I]nvestigator [DiCostanzo] and the school resource officer did not convert the meeting into a custodial interrogation.
>
> 3. [J.D.B.] was informed that he was free to leave and that he did not have to answer any questions, but chose to stay and volunteer more information.

In my view, the trial court's uncontested and binding findings of fact pertaining to the circumstances surrounding the interrogation lead to the conclusion that "a reasonable person in the position of the defendant would [have] believe[d] himself to be in custody or that he had been deprived of his freedom of action in some significant way." *Id.* As such, I would hold that: (1) J.D.B was subjected to custodial interrogation at Smith Middle School; (2) J.D.B. should have been *Mirandized* and provided the enhanced protections for juveniles contained in N.C.G.S. § 7B-2101; and (3) as a result, the trial court erred in denying his motion to suppress. Therefore, I respectfully dissent.

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According to the majority, because the school environment "inherently deprives students of some freedom of action," for a juvenile "to be deemed in custody," the restraint that law enforcement imposes on the juvenile's freedom of action or movement while questioning the juvenile at school must go "well beyond the limitations that are characteristic of the school environment in general." I disagree with this reasoning, primarily because of its potential to seriously undermine the enhanced protections afforded to juveniles by the North Carolina General Assembly, for example, as in N.C.G.S. § 7B-2101. *See In re T.E.F.*, 359 N.C. 570, 575, 614 S.E.2d 296, 299 (2005) ("Our courts have consistently recognized that '[t]he [S]tate has a *greater* duty to protect the rights of a respondent in a juvenile proceeding than in a criminal prosecution.'" (alterations in original) (citations omitted)); *In re Vinson*, 298 N.C. 640, 652, 260 S.E.2d 591, 599 (1979) (stating this Court's intent "to carefully balance the State's police power interest in preserving order and its *parens patriae* interest in a delinquent child's welfare with the child's constitutional right to due process"). I fear that the majority here actually affords juveniles less protection when questioned by law enforcement officers at school, as compared to elsewhere. In my opinion, in the school environment, where juveniles are faced with a variety of negative consequences - including potential criminal charges - for refusing to comply with the requests or commands of authority figures, the circumstances are inherently more coercive and require more, not less, careful protection of the rights of the juvenile.

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> The decision to interview a student at school could be made to take advantage of the student's minority [age]. Questioning the student at school, the officer not only takes advantage of the student's compulsory presence at school and the background norm of submission to authority, but also chooses to interact with the student at a time when the student will not be in the presence of a parent, the figure most likely to have the inclination or ability to either arrange for the presence of counselor to advise the youth to refuse to answer the officer's questions.

Paul Holland, *Schooling* Miranda: *Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 Loy. L. Rev. 39, 85 n.175 (2006) [hereinafter Holland, *Schooling* Miranda]. I am particularly concerned about creating an incentive for an investigating police officer to enter a middle school to question a juvenile about crimes that may have occurred away from school grounds and to take advantage of the more restrictive school atmosphere without providing the protections of N.C.G.S. § 7B-2101. I am also concerned about the potential disruption of the learning atmosphere in the school, especially, but not exclusively, for the affected juvenile if this practice became widespread.

Even under the majority's analysis, though, I believe the record here establishes that the restraint on J.D.B.'s freedom of action or movement went "well beyond the

limitations that are characteristic of the school environment in general" and thus, subjected J.D.B to "custodial interrogation." The school resource officer, who was a uniformed police officer, came to thirteen-year-old J.D.B.'s classroom, removed him from class, and "escorted" him to a conference room where two school officials and Investigator DiCostanzo were waiting for him. No effort was made to contact J.D.B.'s parent or guardian before his removal from class or his questioning. For the entire interrogation, which lasted thirty to forty-five minutes, J.D.B. was isolated in a closed-door conference room in the presence of four authority figures, including two law enforcement officers. Contrary to the trial court's conclusion of law, Investigator DiCostanzo, an outside police officer, was not merely present. Rather, it appears that he directed and controlled the interrogation process, which was designed to determine J.D.B.'s role in nonviolent crimes alleged to have occurred outside of school grounds and for which he was a suspect. Despite J.D.B.'s repeated denials of any involvement in the criminal activity, Investigator DiCostanzo continued to question him. At some point during Investigator DiCostanzo's questioning, Assistant Principal David Lyons encouraged J.D.B. to "'do the right thing' and tell the truth." Thereafter, Officer DiCostanzo continued to question J.D.B., confronted him with the stolen camera, and indicated that others had seen the camera in J.D.B's possession. Then, J.D.B. made his first incriminating statement, asking if "he would still be in trouble if he gave the items back," also indicating that J.D.B. believed he was currently "in trouble." Investigator DiCostanzo

responded that either way "the matter was still going to court" and that he might "have to seek a secure custody order," explaining to J.D.B. that such an order confines a juvenile to a detention center until his court date. After this sequence of events, J.D.B. confessed. I would conclude that considering all of the above circumstances, "a reasonable person in [J.D.B.'s] position . . . would [have] believe[d] himself to be in custody or that he had been deprived of his freedom of action in some significant way" by the time Investigator DiCostanzo confronted J.D.B. with the stolen camera. *Greene*, 332 N.C. at 577, 422 S.E.2d at 737.

In reaching the opposite conclusion, the majority emphasizes that: (1) Investigator DiCostanzo told J.D.B. that he was free to leave, asked him if he understood that he was not under arrest and did not have to speak to him, and that J.D.B. nodded his head indicating he understood; and (2) J.D.B. was not subjected to severe or direct physical restraint, such as an officer standing guard at the door. However, Investigator DiCostanzo did not inform J.D.B. that he was free to leave and not under arrest until *after* J.D.B. had incriminated himself in response to the interrogation, without having been informed of his *Miranda* and juvenile statutory rights. I would conclude that this process violated both *Miranda* and N.C.G.S. § 7B-2101 (a) and (b) and that the motion to suppress should have been allowed. *See* N.C.G.S. § 7B-2101 (2007); *Missouri v. Seibert*, 542 U.S. 600, 604, 159 L. Ed. 2d 643, 650 (2004) (plurality) (stating that "midstream recitation of *[Miranda]* warnings after interrogation and unwarned confession" does "not

effectively comply with *Miranda*'s constitutional requirement"); *see also* N.C.G.S. § 7B-2101(a)(3) (stating that a juvenile who is in custody "must [also] be advised prior to questioning" of his "right to have a parent, guardian, or custodian present during questioning"); *id.* § 7B-2101(b) (stating that for juveniles, such as J.D.B., who are "less than 14 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney").

With regard to stronger indicia of physical control, such as handcuffs or an officer standing guard at the door, this Court has never held that one or more of these indicia must be present to support a determination that an individual is in custody. In fact, in *Buchanan* this Court stated: "Circumstances supporting an objective showing that one is 'in custody' *might* [, not must,] include a police officer standing guard at the door, locked doors or application of handcuffs." 353 N.C. at 339, 543 S.E.2d at 828 (emphasis added). Thus, the absence of such forms of restraint, while a relevant consideration in this inquiry, is not dispositive. Furthermore, "[United States Supreme Court] cases establish that, even if the police do not tell a suspect he is under arrest, do not handcuff him, do not lock him in a cell, and do not threaten him, he may nonetheless. . . be in custody for *Miranda* purposes." *Yarborough v. Alvarado*, 541 U.S. 652, 675, 158 L. Ed. 2d 938, 958-59 (2004) (Breyer, Stevens, Souter & Ginsburg, JJ., dissenting) (citing *Stansbury v. California*, 511 U.S.

318, 325-26, 128 L. Ed. 2d 293, 300-01 (1994) (per curiam); *Berkemer v. McCarty*, 468 U.S. 420, 440, 82 L. Ed. 2d 317, 335 (1984)). Here, law enforcement questioned a thirteen-year-old seventh-grader about nonviolent offenses while he was at school, in a closed room, and in the presence of four authority figures, all adults. Taken with the sequence of events in the interrogation itself, I conclude that J.D.B. was subjected to a custodial interrogation.

As support for its determination that J.D.B. was not subjected to custodial interrogation, the majority cites our recent opinion in *In re W.R.*, 363 N.C. 244, 675 S.E.2d 342 (2009). However, that case is both procedurally and factually distinguishable from this one and is of limited to no precedential value in resolving the custody issue here.

In *In re W.R.*, unlike here, the juvenile failed to make a motion to suppress or to object when his incriminatory statements were offered into evidence, and the juvenile did not assert at the trial level that his incriminatory statements were obtained in violation of either the Fifth Amendment or N.C.G.S. § 7B-2101. *Id.* at 247, 675 S.E.2d at 344. As a result, this Court's review was for plain error. *Id.* In addition, because "no evidence was presented and no findings were made as to . . . the school resource officer's actual participation in the questioning of W.R.[,] . . . the custodial or noncustodial nature of the interrogation[,] . . . . [or] whether the statements were freely and voluntarily made," this Court stated:

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> After careful review, we are not prepared based on the limited record before this Court to conclude that the presence and participation of the school resource officer at the request of school administrators conducting the investigation rendered the questioning of respondent juvenile a "custodial interrogation," requiring *Miranda* warnings and the protections of N.C.G.S. § 7B-2101.

363 N.C. at 248, 675 S.E.2d at 344. In other words, the record pertaining to law enforcement's role in W.R.'s interrogation was insufficient for this Court to make a determination that the interrogation was custodial.

Also numerous important facts bearing on the custody issue distinguish *In re W.R.* from this case. There, unlike here: (1) the assistant principal and the principal, not a law enforcement officer, took the juvenile out of class and "escorted" him to the principal's office after a concerned parent called the school and stated that the juvenile had possessed a knife at school and on the school bus the previous day; (2) both school administrators questioned the juvenile about the alleged "in school" incident and not about crimes alleged to have occurred outside of school grounds; (3) the school resource officer apparently was not present at the start of questioning and left the room at various points; (4) no outside police officer participated; and (5) school administrators, not law enforcement, controlled the questioning. *Id.* at 246, 675 S.E.2d at 343.

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In further contrast to the majority, I believe J.D.B.'s age, thirteen, (and his status as a middle school student) are relevant considerations in determining "whether a reasonable person in the position of the defendant would [have] believe[d] himself to be in custody or that he had been deprived of his freedom of action in some significant way." *Greene*, 332 N.C. at 577, 422 S.E.2d at 737.[5] In support of its conclusion that a juvenile's age should not be considered as part of the custody analysis, the majority: (1) states that this Court has not previously considered an individual's age in conducting the custody inquiry, citing *In re W.R.* in support; and (2) relies on language from *Yarborough v. Alvarado*, which states that an "argument [exists] that the custody inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect's individual characteristics-including his age-could be viewed as creating a subjective inquiry." 541 U.S. at 668, 158 L. Ed. 2d at 954 (majority) (citation omitted).

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5. J.D.B. also argues, and the dissent in the Court of Appeals appears to suggest, that J.D.B.'s enrollment in "special education classes" is a relevant factor to consider in conducting the custody analysis. *See In re J.D.B.*, __ N.C. App. __, __, 674 S.E.2d 795, 802 (2009) (Beasley, J., dissenting). Because the record is silent as to the nature and extent of J.D.B.'s academic status and whether Investigator DiCostanzo knew or reasonably could have known about it, I have not considered J.D.B.'s status as a special education student.

I do not find this reasoning persuasive here.[6] The dissent in the Court of Appeals correctly noted that not considering age "would lead to the absurd result that, when required to determine whether a 'reasonable person in the defendant's situation' would consider himself in custody, courts would apply exactly the same analysis, regardless of whether the individual was eight or thirty-eight years old." *In re J.D.B.*, _ N.C. App. at _, 674 S.E.2d. at 802 (2009) (Beasley, J. dissenting) (citation omitted).

Neither this Court nor the United States Supreme Court has held squarely that age can never be relevant to the custody inquiry. Nor did we conduct a custody

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6. In *In re R.H.*, a panel of the Court of Appeals determined that the trial court did not err in denying the juvenile's motion to suppress his confession because the juvenile was not in custody. *In re R.H.*, 171 N.C. App. 514, 615 S.E.2d 738, 2005 N.C. App. LEXIS 1309 (2005) (unpublished). There, the juvenile was questioned by an outside law enforcement officer at school regarding a purported crime away from school grounds. 2005 N.C. App. LEXIS 1309, at *2. Even though that case was unpublished, the differences between how the officer approached his questioning of the juvenile there and here are striking. There, before questioning the juvenile, the officer obtained permission from the fourteen-year-old's mother to talk to him at school and explained to him that "he was not under arrest," that he "could leave and return to class at any time and that regardless of what [the] juvenile told him that day, he would not arrest [him]." *Id.*, at *4. By contrast with what happened here, I believe the approach taken by the officer in that case can be squared with *Miranda* and the enhanced statutory protections for juveniles.

analysis in *In re W.R.* without considering the juvenile's age. Rather, as noted above, this Court simply determined that the record on appeal regarding the role of law enforcement in questioning the juvenile was insufficient on the custody issue. The majority concedes that *Alvarado* is not binding authority on this Court. Furthermore, while the Supreme Court there held that the state court's failure to consider the defendant's age (seventeen) was reasonable in considering custody under *Miranda*, I conclude that the matter is very different when the interrogation is conducted in school. As Justice O'Connor stated in her concurring opinion in *Alvarado*, "There may be cases in which a suspect's age will be relevant to the 'custody' inquiry under *Miranda*." 541 U.S. at 669, 158 L. Ed. 2d at 954-55 (O'Connor, J., concurring) (citation omitted). I share the view expressed by Justice Breyer in his dissenting opinion, that a juvenile's youth "is not a special quality, but rather a widely shared characteristic that generates commonsense conclusions about behavior and perception." *Id.* at 674, 158 L. Ed. 2d at 958 (Breyer, J., dissenting).

It is clear from the enhanced protections given to juveniles that our General Assembly considers age very important under state law, especially when the juvenile is under fourteen, like J.D.B. "To focus on the circumstance of age in a case like this does not complicate the 'in custody' inquiry." *Id.* at 674-75, 158 L. Ed. 2d at 958 (citation omitted).

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> Outside officers conducting interviews at schools are likely doing so only when they are looking for a specific student and thus are likely to already know the student's age. Even if they do not, these officers rely on school staff to assist them in establishing contact with the student. These staff members, of course, have access to the student's records, which will include the age. Seen in this context, courts considering the age of the suspect are not imposing an extra burden of intuition or information on officers but are instead seeing the interrogation in its full context, as it is likely seen by those involved.

Holland, *Schooling* Miranda 85 (footnote omitted). Here, Investigator DiCostanzo specifically testified that he had been informed by school administrators that J.D.B. was thirteen years old before questioning him.

In sum, I would hold that, under all these circumstances, including his age, J.D.B. was in custody while being questioned at Smith Middle School; consequently, his constitutional and juvenile statutory rights were violated due to law enforcement's failure to *Mirandize* him or to comply with N.C.G.S. § 7B-2101 and the trial court erred in denying his motion to suppress. Therefore, I respectfully dissent.

Justice TIMMONS-GOODSON joins in this dissenting opinion.

APPENDIX D — OPINION OF THE NORTH CAROLINA COURT OF APPEALS FILED APRIL 7, 2009

NO. COA08-499

NORTH CAROLINA COURT OF APPEALS

Filed: 7 April 2009

IN THE MATTER OF

J.D.B. Juvenile
Orange County
No. 05 JB 115

Appeal by juvenile from order filed 16 October 2007, *nunc pro tunc*, 13 December 2005, by Judge Joseph M. Buckner in Orange County District Court. Heard in the Court of Appeals 12 January 2009.

MARTIN, Chief Judge.

On 19 October 2005, juvenile petitions were filed against juvenile J.D.B. for two counts each of felonious breaking and entering and larceny. Subsequently, J.D.B. filed a motion to suppress certain inculpatory statements made to law enforcement officers, as well as other evidence obtained by them, on the grounds that the statements and evidence were obtained through an unlawful custodial interrogation which occurred on 29 September 2005. After hearing evidence, the trial court denied the motion to suppress. Reserving his right to

appeal the denial of his motion to suppress. J.D.B. entered a transcript of admission to both counts of felonious breaking and entering and larceny as alleged in the petitions. The trial court adjudicated J.D.B. delinquent and entered a disposition order placing J.D.B. on probation and awarding restitution to the victims. J.D.B. then appealed the denial of his motion to suppress and the portion of the disposition order requiring him to pay restitution.

This Court issued an opinion affirming the order of restitution but remanding this case for proper findings of fact to support the trial court's denial of the motion to suppress. *See In re J.B.*, 183 N.C. App. 299, 644 S.E.2d 270 (2007) (unpublished) (remanding to the trial court for proper findings of fact regarding whether the juvenile was in custody for *Miranda* purposes). Upon remand, the trial court filed and entered its order making findings of fact, conclusions of law, and denying J.D.B.'s motion to suppress. J.D.B. now appeals from this second order. In denying the motion, the trial court made, upon remand, the following findings of fact which have not been challenged on appeal:

> 5. [J.D.B.] is in the seventh grade and enrolled in special education classes.
>
> 6. [J.D.B.] was escorted from his class and into a conference room to be interviewed. Present in the room were Investigator DiCostanzo, Assistant Principal David Lyons, a school resource officer and an intern. The door was closed, but not locked.

7. [J.D.B.] was not administered Miranda warning [sic] and was not offered the opportunity to speak to a parent or guardian prior to the commencement of questioning. Additionally, no parent or guardian was contacted prior to [J.D.B.]'s removal from class.

8. Investigator DiCostanzo asked [J.D.B.] if he would agree to answer questions about recent break-ins. [J.D.B.] consented.

9. [J.D.B.] stated that he had been in the neighborhood looking for work mowing lawns and initially denied any criminal activity.

10. Mr. Lyons then encouraged [J.D.B.] to "do the right thing" and tell the truth.

11. The investigator questioned him further and confronted him with the fact that the camera had been found.

12. Upon [J.D.B.]'s inquiry as to whether he would still be in trouble if he gave the items back, the investigator responded that it would be helpful, but that the matter was still going to court and that he may have to seek a secure custody order.

13. [J.D.B.] then confessed to entering the houses and taking certain items together with another juvenile.

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14. The investigator informed [J.D.B.] that he did not have to speak with him and that he was free to leave. He asked him if understood [sic] that he was not under arrest and did not have to talk with the investigator.

15. [J.D.B.] indicated by nodding "yes" that he understood that he did not have to talk to the officer and that he was free to leave. He continued to provide more details regarding where certain items could be located.

16. [J.D.B.] wrote a statement regarding his involvement in the crime.

17. The bell rang signaling the end of the day and [J.D.B.] was allowed to leave to catch his bus home.

18. The interview lasted from 30 to 45 minutes.

19. The investigator had informed [J.D.B.] that he would see him later and would be speaking to his grandmother and aunt.

20. Investigator DiCostanzo and Officer Hunter went to the home of [J.D.B.], but found no one home. When [J.D.B.] arrived, he told the officers they could look around and he would show them where the jewelry was located.

21. Investigator DiCostanzo informed [J.D.B.] that he needed to obtain a search warrant and left Officer Hunter to wait outside [J.D.B.]'s home.

22. While awaiting the search warrant, [J.D.B.] brought a ring to the officer from inside the home.

23. Upon the investigator's return with the warrant, [J.D.B.] entered the home with the officers and handed them several stolen items and led the investigator to where other items could be found on the roof of a gas station down the road. During the entire time that the officers were at his residence and travelling [sic] with him to the BP station, no parent or guardian was contacted or advised of the situation. [J.D.B.] was not advised of his Miranda warnings or told he had the right to speak to or have a parent or guardian present.

24. Investigator DiCostanzo left his card and a copy of the search warrant at [J.D.B.]'s residence.

25. All of [J.D.B.]'s responses to the officer's questions were appropriately responsive, indicating that he was capable of understanding the fact that he did not have to answer questions.

> 26. All of [J.D.B.]'s responses to counsel during the suppression hearing were appropriately responsive.

Based on these findings, the trial court concluded that at no point during the course of events on 29 September 2005 was J.D.B. in custody. The trial court also concluded that all of the statements made by J.D.B. and actions taken by J.D.B. in the presence of law enforcement occurred voluntarily. Based on these conclusions of law, the trial court ordered that the motion to suppress be denied.

On appeal, J.D.B. assigns error to the trial court's denial of his motion to suppress, arguing that his statement to officers occurred during a custodial interrogation where officers failed to administer the proper warnings under *Miranda* and N.C.G.S. § 7B-2101(a), thus violating his Fifth Amendment rights. As part of this argument, J.D.B. contends that, because "no reasonable special education, thirteen-year-old seventh grader without his guardian or some other advocate would [have felt] free to leave," the trial court should have concluded that J.D.B. was in custody for purposes of *Miranda* and N.C.G.S. § 7B-2101(a). We disagree.

We begin by noting that the trial court's findings of fact after a hearing concerning the admissibility of a confession are conclusive and binding on this Court when supported by competent evidence. *See State v. Barber*, 335 N.C. 120, 129, 436 S.E.2d 106, 111 (1993),

cert. denied, 512 U.S. 1239, 129 L. Ed. 2d 865 (1994). The trial court's conclusions of law, however, are reviewable *de novo*. *See id.* Under this standard, the legal significance of the findings of fact made by the trial court is a question of law for this Court to decide. *See State v. Davis*, 305 N.C. 400, 415, 290 S.E.2d 574, 583 (1982).

The Fifth Amendment of the United States Constitution guarantees that "[n]o . . . person shall be compelled in any criminal case to be a witness against himself." U. S. Const. amend. V. In *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), the United States Supreme Court determined that the prohibition against self-incrimination requires that, prior to a custodial interrogation, a defendant must be advised

> that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 479, 16 L. Ed. 2d at 726. The *Miranda* rule "was conceived to protect an individual's Fifth Amendment right against self-incrimination in the inherently compelling context of custodial interrogation by police officers." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001); *see also Miranda*, 384 U.S. at 467, 16 L. Ed. 2d at 706.

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In addition to the warnings required by the *Miranda* decision, our General Assembly has mandated other protections for juveniles, as set out in N.C.G.S. § 7B-2101(a). Under this statute, prior to questioning, an in-custody juvenile must be advised that:

> (1) he has the right to remain silent; (2) any statement he makes can be and may be used against him; (3) that he has a right to have a parent, guardian, or custodian present during questioning; [and] (4) that he has a right to consult with an attorney and that one will be appointed for him if he is not represented and wants representation.

In re W.R., 179 N.C. App. 642, 645, 634 S.E.2d 923, 926 (2006) (citing N.C. Gen. Stat. § 7B-2101(a) (2005)). However, the rights protected by *Miranda* and N.C.G.S. § 7B-2101(a) apply only to custodial interrogations. *See State v. Gaines*, 345 N.C. 647, 661, 483 S.E.2d 396, 404-05, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997) (noting that "the rule of *Miranda* applies only where a defendant is subjected to custodial interrogation," and that, "similarly, N.C.G.S. § 7A-595(d) [now N.C.G.S. § 7B-2101(a)] pertains only to statements obtained from a juvenile defendant as the result of custodial interrogation").

"[C]ustodial interrogation . . . mean[s] questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384

U.S. at 444, 16 L. Ed. 2d at 706 (1966); *Buchanan*, 353 N.C. at 337, 543 S.E.2d at 826. "[I]n determining whether a suspect is in custody, an appellate court must examine all the circumstances surrounding the interrogation but the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest." *Buchanan*, 353 N.C. at 338, 543 S.E.2d at 827. This involves "'an objective test as to whether a reasonable person in the position of the defendant would believe himself to be in custody or that he had been deprived of his freedom of action in some significant way.'" *State v. Sanders*, 122 N.C. App. 691, 693, 471 S.E.2d 641, 642 (1996) (quoting *State v. Greene*, 332 N.C. 565, 577, 422 S.E.2d 730, 737 (1992)). No single factor controls the determination of whether an individual is "in custody" for purposes of *Miranda*. *State v. Garcia*, 358 N.C. 382, 397, 597 S.E.2d 724, 737 (2004) (citing *State v. Barden*, 356 N.C. 316, 338, 572 S.E.2d 108, 124 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). Circumstances supporting an objective showing that one is "in custody" might include a police officer standing guard at the door, locked doors, or application of handcuffs. *Buchanan*, 353 N.C. at 339, 543 S.E.2d at 828. The subjective belief of the defendant as to his freedom to leave is not in and of itself determinative. *State v. Hall*, 131 N.C. App. 427, 432, 508 S.E.2d 8, 12 (1998), *aff'd*, 350 N.C. 303, 513 S.E.2d 561 (1999). Furthermore, our Supreme Court has held that an objective "free to leave test" is broader than, and not synonymous with, the appropriate test for determining the custody issue. *See Buchanan*, 353 N.C. at 339-40, 543 S.E.2d at 828.

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Here, the trial court found that J.D.B. was escorted from class and into the conference room by a uniformed school resource officer. Present in the room were Investigator DiCostanzo, two school officials, and the school resource officer. The door was closed but not locked. J.D.B. was not searched or handcuffed. J.D.B. only began speaking with Investigator DiCostanzo after agreeing to answer questions. Furthermore, J.D.B.'s responses and questions indicated that he understood he did not have to answer questions, that he was not under arrest, and that "the matter was still going to court." After writing his own statement regarding his involvement in the crime, J.D.B. left the conference room and school property when the bell rang, the interview having lasted approximately 30 to 45 minutes. Later, when officers met with J.D.B. at his home, J.D.B. freely offered to let the officers look around the house and even brought a piece of stolen jewelry out to Officer Hunter after Investigator DiCostanzo had gone to get a search warrant. When Investigator DiCostanzo returned with the warrant, J.D.B. voluntarily led the officers through the house and to the locations of other stolen items. These findings are uncontested. Although J.D.B. argues on appeal that Investigator DiCostanzo threatened him with a secure custody order, we note that the trial court did not make any finding of fact that J.D.B. was threatened. The trial court's Finding of Fact 12, which provides that, "*upon [J.D.B.]'s inquiry, . . .* the investigator *responded* that . . . he may have to seek a secure custody order," (emphasis added), is supported by competent evidence and thus binding upon this Court on appeal. *See Barber*, 335 N.C. at 129, 436 S.E.2d at 111.

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As discussed above, the appropriate standard for determining whether an individual is "in custody" is whether a reasonable person in the individual's position would have believed himself to be in custody or deprived of his freedom of action in some significant way. *Sanders*, 122 N.C. App. at 693, 471 S.E.2d at 642. This test is "objective . . . based upon the reasonable person standard, and is 'to be applied on a case-by-case basis considering all the facts and circumstances.'" *Hall*, 131 N.C. App. at 432, 508 S.E.2d at 12 (quoting *State v. Medlin*, 333 N.C. 280, 291, 426 S.E.2d 402, 407 (1993)). "The objective test furthers 'the clarity of [*Miranda's*] rule,' ensuring that the police do not need to 'gues[s] as to [the circumstances] at issue before deciding how they may interrogate the suspect.'" *Yarborough v. Alvarado*, 541 U.S. 652, 667, 158 L. Ed. 2d 938, 945 (2004) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 430-31, 82 L. Ed. 2d 317, 329 (1984)). Thus, J.D.B.'s subjective belief that he was not free to leave is not, in and of itself, determinative of whether he was "in custody." *See Hall*, 131 N.C. App. at 432, 508 S.E.2d at 12. Instead, we must examine all of the circumstances surrounding J.D.B.'s interactions with officers and apply the objective test discussed above. *See Buchanan*, 353 N.C. at 338, 543 S.E.2d at 827.

An individual's mental capacity and age, standing alone, are not determinative of whether he is "in custody" for purposes of *Miranda* and N.C.G.S. § 7B-2101(a). In fact, "consideration of a suspect's individual characteristics - including age - could be viewed as creating a subjective inquiry." *Yarborough*, 541 U.S. at

668, 158 L. Ed. 2d at 945 (citing *Oregon v. Mathiason*, 429 U.S. 492, 495-96, 50 L. Ed. 2d 714, 719 (1977) (noting that facts arguably relevant to whether an environment is coercive may have "nothing to do with whether respondent was in custody for purposes of the *Miranda* rule")). Instead, an individual's subnormal mental capacity and age are factors to be considered when determining whether a knowing and intelligent *waiver* of rights has been made. *See State v. Fincher*, 309 N.C. 1, 8, 305 S.E.2d 685, 690 (1983) (citing *State v. Jenkins*, 300 N.C. 578, 268 S.E.2d 458 (1980) (holding that though defendant was mildly mentally retarded, he knowingly and intelligently waived his right to counsel before making a custodial statement); *State v. Thompson*, 287 N.C. 303, 214 S.E.2d 742 (1976) (holding that, 19-year-old defendant with an I.Q. of 55 was capable of waiving his rights)). The rights protected by *Miranda* and N.C.G.S. § 7B-2101(a) only apply to custodial interrogations. *See Gaines*, 345 N.C. at 661, 483 S.E.2d at 404-05 (citing *State v. Phipps*, 331 N.C. 427, 442, 418 S.E.2d 178, 185 (1992)). As such, the question of whether those rights have been waived is irrelevant unless the individual was in custody.

Here, the trial court utilized the appropriate standard for determining whether J.D.B. was in custody during his 29 September 2005 interactions with officers. Upon our review of the trial court's uncontested findings of fact, we conclude that a reasonable person in J.D.B.'s position would not have believed himself to be in custody or deprived of his freedom of action in some significant way. Because J.D.B. was not in custody during his

interactions with officers in the case at bar, we need not decide any issue regarding waiver of J.D.B.'s rights under *Miranda* or N.C.G.S. § 7B-2101(a). Accordingly, we conclude that the trial court correctly denied J.D.B.'s motion to suppress.

Affirmed.

Judge BRYANT concurs with separate opinion.

Judge BEASLEY dissents with separate opinion.

Appendix D

BRYANT, Judge, concurring in a separate opinion.

I write separately to reiterate that the test for determining whether a juvenile is in custody thereby warranting a *Miranda* warning is an objective test to be applied on a case-by-case basis based on the totality of the circumstances. *State v. Buchanan*, 353 N.C. 332, 339-40, 543 S.E.2d 823, 828 (2001). I also write to distinguish the instant case from *In re W.R.*, 179 N.C. App. 642, 634 S.E.2d 923 (2006), where this Court vacated a juvenile adjudication when the juvenile's incriminating statement was obtained during questioning without being given the proper *Miranda* warnings.

In *W.R.*, we considered whether the questioning of the juvenile was non-custodial and, as such, did not require a *Miranda* warning. *Id.* at 644, 634 S.E.2d at 925. The juvenile, a fourteen-year-old, middle school student, was taken from his classroom to the Assistant Principal's office where he was repeatedly questioned for thirty minutes by the Principal, Assistant Principal, and the School Resource Officer (SRO) (who was also an officer with the Greensboro Police Department) regarding whether he possessed a knife at school on the previous day. *Id.* at 623, 634 S.E.2d at 924-25. No indication was given that the juvenile was free to leave. In fact "the juvenile was kept in the office under the supervision of [the SRO] while both the Principal and Assistant Principal stepped out to interview other students." *Id.* at 646, 634 S.E. 2d at 927. Additionally, after approximately fifteen minutes into the

questioning, and after repeated denials by the juvenile, the juvenile was subjected to a search of his person by the SRO. Further, the juvenile was detained by the SRO for an additional one and one-half hours until his mother picked him up. *Id.* Based on the totality of the circumstances, this Court held that "a reasonable person standing in the place of the juvenile would have believed that he was restrained in his movement to the degree associated with a formal arrest." *Id.*

Unlike *W.R.*, the totality of the circumstances in the present case would not lead a reasonable person in J.D.B.'s position to believe he was "in custody or that he had been deprived of his freedom of action in a significant way." *Buchanan*, 353 N.C. at 338, 543 S.E.2d at 827. Although the juveniles in both cases were middle-school students and were questioned by several adults, including police officers, the circumstances in the present case do not include the same indicia of restraint as *W.R.* Unlike *W.R.*, the record indicates J.D.B. was informed and indicated he understood that he did not have to answer any questions and was free to leave at any time. Further, J.D.B. was not detained for over an hour, but was released after half an hour. However, most notably, J.D.B.'s person was not searched during the questioning. Based on the totality of the circumstances in the instant case, a reasonable person would not have believed he was restrained in his movement. Therefore, I concur in the majority opinion affirming the trial court's denial of J.D.B.'s motion to suppress.

Appendix D

BEASLEY, Judge, dissenting

The issue is whether the court's findings of fact support its conclusion of law that the juvenile (J.D.B.) was not in custody when he was questioned by Detective DiCostanzo. Because I believe that the court's findings of fact clearly show that J.D.B. was in custody, I respectfully dissent.

"[T]he initial inquiry in determining whether *Miranda* warnings were required is whether an individual was 'in custody.'" *State v. Buchanan*, 353 N.C. 332, 337, 543 S.E.2d 823, 826 (2001). "In *Miranda*, the Supreme Court defined 'custodial interrogation' as 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' . . . The Supreme Court of North Carolina [has recognized that] 'in determining whether a suspect [is] in custody, an appellate court must examine all the circumstances surrounding the interrogation; but the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest.'" *Buchanan*, 353 N.C. at 337, 338, 543 S.E.2d at 826, 828 (quoting *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966); and *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405 (1997)).

"[U]nder *Miranda*, whether an individual is in custody is a mixed question of law and fact. Accordingly, . . . we review the trial court's conclusions of law for

legal accuracy and to ensure that those conclusions 'reflect[] a correct application of [law] to the facts found.' In doing so, this Court must look first to the circumstances surrounding the interrogation and second to the effect those circumstances would have on a reasonable person." *State v. Garcia*, 358 N.C. 382, 391, 597 S.E.2d 724, 733 (2004) (quoting *State v. Golphin*, 352 N.C. 364, 409, 533 S.E.2d 168, 201 (2000) and citing *Thompson v. Keohane*, 516 U.S. 99, 112, 133 L. Ed. 2d 383, 394 (1995) (internal quotation omitted).

Review of the trial court's findings of fact makes it clear that J.D.B. was in custody at the time of his initial inculpatory statements. Findings 1 through 5 state, as relevant to the issue of custody, the following:

> 1. [In September 2005, homes] were broken into and various items were stolen, including jewelry [and] a digital camera.
>
> 2. The juvenile, at the time 13 years old, was interviewed by police on the same day as the break-ins after he was seen behind a residence in the same neighborhood.
>
> 3. . . . [P]olice were informed that the juvenile had been seen in possession of [the stolen] digital camera at school[.]

4. Investigator Joseph DiCostanzo of the Chapel Hill Police Department . . . went to the juvenile's school to speak with him.

5. The juvenile is in the seventh grade and enrolled in special education classes.

These findings establish that J.D.B. was a thirteen year old seventh grader in the special education program at his school. The majority opinion correctly notes that an objective standard governs the issue of custody, and that J.D.B.'s "mental capacity and age, standing alone, are not determinative of whether he was 'in custody' for purposes of *Miranda* and N.C. Gen. Stat. § 7B-2101 (a)." However, the fact that J.D.B. was a middle school aged child is certainly among the circumstances relevant to "whether a reasonable person in [J.D.B.'s] position, under the totality of the circumstances, would have believed that he was under arrest or was restrained in his movement to the degree associated with a formal arrest." *Buchanan*, 353 N.C. at 339-40, 543 S.E.2d at 828. To hold otherwise would lead to the absurd result that, when required to determine whether a "reasonable person in the defendant's situation" would consider himself in custody, courts would apply exactly the same analysis, regardless of whether the individual was eight or thirty-eight years old. *Id.*

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Findings of fact 6 and 8 state:

> 6. The juvenile was escorted from his class and into a conference room to be interviewed. Present in the room were Investigator DiCostanzo, Assistant Principal David Lyons, a school resource officer and an intern. The door was closed, but not locked.
>
> . . . .
>
> 8. Investigator DiCostanzo asked the juvenile if he would agree to answer questions about recent break-ins. The juvenile consented.

I would hold that J.D.B. was in custody after: (1) he was escorted by a uniformed school resource officer, rather than being allowed to report to the office on his own; (2) he was taken to an office and the door was shut; (3) four adults were in the room with J.D.B., including Police Officer DiCostanzo, the school resource officer, an assistant principal, Mr. Lyons, and an administrative intern; and (4) Officer DiCostanzo asked J.D.B. to answer questions about recent crimes.

The majority opinion notes that J.D.B. was not subjected to the more severe indicia of physical control, such as the application of handcuffs, a locked door, or an armed officer standing guard. However, the offense was nonviolent, and J.D.B. was outnumbered by two

police officers, a school administrator, and another adult. J.D.B. presented no threat to the officers' safety. They had no reason to hold J.D.B. at gunpoint, handcuff him, or lock the door, precisely *because* J.D.B. was a thirteen year old in a closed room with four adults. I conclude that the mere absence of these circumstances contributes little to our analysis.

Furthermore, even assuming, *arguendo*, that J.D.B. was not yet in custody, the next findings of fact remove any doubt about his situation:

> 9. The juvenile stated that he had been in the neighborhood looking for work mowing lawns and initially denied any criminal activity.
>
> 10. Mr. Lyons then encouraged the juvenile to "do the right thing" and tell the truth.
>
> 11. The investigator questioned him further and confronted him with the fact that the camera had been found.
>
> 12. Upon the juvenile's inquiry as to whether he would still be in trouble if he gave the items back, the investigator responded that it would be helpful, but that the matter was still going to court and that he may have to seek a secure custody order.

Thus, after J.D.B. answered the officer's questions, he was not released to return to class and the law enforcement officers and assistant principal made it clear that they would not accept his answers.

An argument can be made that Mr. Lyons acted as an agent of the police when he participated in their interrogation of J.D.B. by urging J.D.B. to "do the right thing" and "tell the truth." *See State v. Morrell*, 108 N.C. App. 465, 470, 424 S.E.2d 147, 151 (1993) ("when an accused's statements stem from custodial interrogation by one who in effect is acting as an agent of law enforcement, such statements are inadmissible unless the accused received a Miranda warning prior to questioning").

The following excerpt from the hearing transcript amplifies the factual background of finding of fact 12. Officer DiCostanzo testified that when J.D.B. denied involvement in the break-ins, he confronted him with the fact that witnesses had seen J.D.B. in possession of a camera that was identified by serial number as the one taken in a recent break-in. He testified further:

> DISTRICT ATTORNEY: Did [J.D.B.] make any response to this - you having found the camera?
>
> OFFICER DICOSTANZO: He really remained quiet . . . *like he wasn't sure what he wanted to say.* And that's when [the assistant principal] you know, was

encouraging him, said that he had had long conversations with [J.D.B.], said *he really wanted [J.D.B.] to do the right thing* because the truth always comes out in the end. [J.D.B.] asked at this point if he got the stuff back was he still gonna be in trouble? And I told [J.D.B.] that it would help to get the items back but that, quote, *this thing is going to court*. I specifically said, what's done is done, [J.D.B.], now *you need to help yourself by making it right*. I told [J.D.B.] that with the information that I had been given, that *if I felt that he was going to* go out and *break into other people's houses* again *because he really didn't care, then I would have to look at getting a secure custody order*. And he asked what that was. And I explained to him that it's where you get sent to juvenile detention before court. And at that time I said, [J.D.B.], you don't have to speak to me; you don't have to talk to me; if you want to get up and leave, you can do so, but that I hoped he would listen to what I had to say. And I said to him, do you understand you're not under arrest and you don't have to talk to me about this. He nodded his head yes, and that's when he just started rambling really quickly about [details of the break-ins.] . . .

(emphasis added).

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This testimony reveals that *after* J.D.B. made an incriminating statement (asked whether he would still be in trouble if he returned the stolen items), Officer DiCostanzo informed J.D.B. that he now had enough information that the matter was definitely "going to court." The officer then issued what is best construed as a threat, saying that J.D.B. should "help himself" and that if the officer "felt" that J.D.B. would break into more homes, then he would try to get a secure custody order. By inquiring about the secure custody order, J.D.B. was attempting to understand the consequences of his failure to cooperate with Officer DiCostanzo. The unmistakable implication is that, to prevent Officer DiCostanzo from having the "feeling" that J.D.B. might engage in future break-ins, J.D.B. would have to "help himself" by providing the police with more information.

Officer DiCostanzo's testimony supports the findings of fact, and also establishes that Officer DiCostanzo told J.D.B. he was not required to stay and talk and was not "under arrest" only *after* (1) J.D.B. was coerced to "do the right thing and to "help himself"; (2) J.D.B. had made incriminating statements; (3) Officer DiCostanzo told J.D.B. that the case was definitely going to court; and (4) Officer DiCostanzo suggested that unless J.D.B. demonstrated that he was not likely to commit future break-ins, the officer might "feel like" J.D.B. needed to be locked up.

The North Carolina legislature has granted additional protection to juveniles, beyond that required by the holding of *Miranda*. Under N.C. Gen. Stat.

§ 7B-2101 (2007), a juvenile who is in custody "must be advised prior to questioning" of his "right to have a parent, guardian, or custodian present" during questioning. Moreover, if "the juvenile is less than 14 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney." N.C. Gen. § 7B-2101(a) (3), and (b) (2007). "In my view, the enactment of a lengthy and detailed juvenile code shows great concern on the part of the legislature not only for dealing effectively with juvenile crime, . . . but also for safeguarding the individual rights of juveniles. Juveniles are not, after all, miniature adults. Our criminal justice system recognizes that their immaturity and vulnerability sometimes warrant protections well beyond those afforded adults." *In re Stallings*, 318 N.C. 565, 576, 350 S.E.2d 327, 333 (1986) (Martin, J., dissenting).

The United States Supreme Court has held that, to be legally effective, the required warnings must be given *before* the suspect is questioned and a confession obtained. *Missouri v. Seibert*, 542 U.S. 600, 604, 159 L. Ed. 2d 643, 651 (2004) ("midstream recitation of warnings after interrogation and unwarned confession" does "not effectively comply with *Miranda's* constitutional requirement"). Similarly, Officer DiCostanzo's perfunctory recitation that J.D.B. did not have to talk came only after the boy had "let the cat out of the bag." Thereafter:

13. The juvenile then confessed to entering the houses and taking certain items together with another juvenile.

14. The investigator informed the juvenile that he did not have to speak with him and that he was free to leave. He asked him if [he] understood that he was not under arrest and did not have to talk with the investigator.

15. The juvenile indicated by nodding "yes" that he understood that he did not have to talk to the officer and that he was free to leave. He continued to provide more details regarding where certain items could be located.

16. The juvenile wrote a statement regarding his involvement in the crime.

17. The bell rang signaling the end of the day and the juvenile was allowed to leave to catch his bus home.

18. The interview lasted from 30 to 45 minutes.

To summarize, the findings of fact stated that J.D.B. was sitting in a seventh grade special education classroom, when a uniformed school resource officer arrived and led him away from class. He was taken to a

room where he was met by the assistant principal, an intern, and a city law enforcement officer. The door was shut and J.D.B. was asked if he would answer questions about recent break-ins. When he denied wrongdoing, the assistant principal joined in, urging J.D.B. to "tell the truth" and Officer DiCostanzo revealed that he had evidence of J.D.B.'s possession of a stolen camera. J.D.B. then asked if he could get out of trouble by returning the stolen items. Officer DiCostanzo responded to this incriminating question by telling J.D.B. that the case would definitely go to court, warning J.D.B. that if the officer "felt" that J.D.B. would commit more break-ins he might seek an order for secure custody, and urging the juvenile to "help himself." Only *after* this did Officer DiCostanzo tell J.D.B. that he did not have to answer questions and was not under arrest.

Application of common sense and the correct legal standard to the court's findings of fact leads to an inescapable conclusion that J.D.B. was in custody when he made inculpatory statements. Moreover, the physical evidence obtained as a result of this unconstitutional interrogation was "fruit of the poisonous tree," *see Wong Sun v. United States*, 371 U.S. 471, 488, 9 L. Ed. 2d 441, 455 (1963), and should also be suppressed. Accordingly, I respectfully dissent.

APPENDIX E — OPINION OF THE NORTH CAROLINA COURT OF APPEALS FILED MAY 15 2007

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA06-662

NORTH CAROLINA COURT OF APPEALS

Filed: 15 May 2007

IN THE MATTER OF:

J.B.,
Juvenile.
Orange County
No. 05 JB 115

Appeal by juvenile from order entered 13 December 2005 by Judge Joseph M. Buckner and from order entered 24 January 2006 by Judge M. Patricia Devine in Orange County District Court. Heard in the Court of Appeals 11 January 2007.

Attorney General Roy Cooper, by Assistant Attorney General LaShawn L. Strange, for the State.

Lisa Skinner Lefler for juvenile-appellant.

Appendix E

GEER, Judge.

The juvenile J.B. ("Jake"),[1] who was adjudicated delinquent, appeals from the denial of his pretrial motion to suppress and a disposition order requiring, *inter alia*, the payment of restitution. We believe that *In re J.L.B.M.*, 176 N.C. App. 613, 627 S.E.2d 239 (2006), is dispositive: Because the trial court failed to make any findings of fact in support of its denial of the motion to suppress, we must remand for entry of findings of fact. In the absence of such findings, we are unable to effectively review the trial court's ruling. With respect to Jake's challenge to the restitution order, we find that, during the disposition phase, defense counsel accepted the ordering of restitution in an amount not exceeding $500.00. Accordingly, we find no basis for overturning the trial court's order regarding restitution.

Facts

On 24 September 2005, break-ins occurred at two homes in Chapel Hill, and various items were stolen, including a digital camera. On the same day, Jake was interviewed by police because he was seen "peeping" around the back of a residence in the same neighborhood. Subsequently, the police received information that Jake had passed along a digital camera to another student at his middle school.

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1. In order to maintain the juvenile's privacy, we will use the pseudonym "Jake" throughout this opinion.

Based on this information, Officer DiCostanzo of the Chapel Hill Police Department went to the school to speak with Jake, who at the time was a 13-year-old seventh grader enrolled in special education classes. Jake was removed from class by a uniformed school resource officer and escorted to a conference room. Assembled in the room were Officer DiCostanzo, the school resource officer, the assistant principal, and one of the principal's interns. Once Jake arrived, the door to the conference room was shut.

Officer DiCostanzo began by asking Jake whether he would agree to answer questions about the recent break-ins. Jake agreed and initially denied any wrongdoing. He acknowledged that he was in the vicinity of the break-ins on the day in question, but claimed that he was merely going door-to-door trying to be hired to do small jobs.

Officer DiCostanzo then disclosed to Jake that the stolen digital camera had been recovered. At this point, the assistant principal began to encourage Jake to "do the right thing" and tell the truth. Jake asked "if he got the stuff back was he still gonna be in trouble." The officer replied that "it would help" to return the items, but that nonetheless "this thing is going to court." The officer also said that he could potentially seek an order to hold Jake in juvenile detention prior to a trial.

Before Jake made any further statements, Officer DiCostanzo told Jake that he was not under arrest, that he was free to leave, and that he was not required to

speak about the case. The officer asked whether Jake understood that he was not under arrest and that he did not have to speak, and he nodded "yes" in response. Jake then explained to the officer the details of how he and a friend broke into the two houses and stole a camera, a cell phone, and jewelry. At the officer's request, Jake provided a written statement admitting to the offenses.

After Jake finished the written statement, the school bell rang, signaling the end of the school day. Officer DiCostanzo concluded the interview and told Jake that he should leave so that he would not miss his bus. The interview had lasted about 30 to 45 minutes.

Officer DiCostanzo returned to the police station and picked up one of his colleagues, Officer Hunter. Together, the two officers drove to Jake's residence, but found no one there. Jake, however, soon arrived home on the school bus and invited the officers inside to show them the stolen property. Officer DiCostanzo explained that he would need a warrant to search the house, since Jake could not provide valid consent.

Officer DiCostanzo then left to obtain a search warrant, leaving Officer Hunter waiting outside the residence with Jake. When Officer DiCostanzo returned with the search warrant, Jake immediately handed the officers one of the stolen rings that he had been keeping in his pocket. The officers then went inside the house with Jake, and Jake proceeded to lead the officers to various spots where he had hidden the stolen jewelry.

Jake also disclosed that he had thrown some jewelry on the top of a shed at a nearby gas station. Officer DiCostanzo and Jake walked down to the gas station and recovered the jewelry, which was still on the roof of the shed.

On 19 October 2005, the State filed two juvenile petitions, one for each home he entered, alleging that Jake was a delinquent juvenile for breaking and entering and larceny. Prior to the adjudication and disposition hearing, Jake moved to suppress the statements he made to Officer DiCostanzo on the grounds that he was interrogated by police in a custodial setting without being afforded *Miranda* warnings and without having a parent or guardian present. Jake also moved to suppress the physical evidence that he turned over to police, contending that this evidence was "fruit of the poisonous tree." The district court conducted a hearing on the motion to suppress on 13 December 2005. Immediately following testimony from both Officer DiCostanzo and Jake and without hearing oral argument from counsel, the court orally "rule[d] that there is no custody for purposes of this interrogation" and denied the motion to suppress. The court subsequently entered a written order that stated in its entirety: "After hearing evidence from investigator Joe Dicostanzo [sic] and the juvenile, the juvenile's motion to suppress statements and evidence seized is denied."

On 24 January 2006, the district court held an adjudication and disposition hearing, at which Jake

admitted the allegations in the two juvenile petitions. Jake signed a transcript of admission, but renewed his arguments with respect to the motion to suppress. Based on Jake's admission, the court adjudicated Jake a delinquent juvenile. During the disposition phase of the proceeding, the court placed Jake on 12 months probation, with associated conditions, and ordered Jake to pay approximately $500.00 in restitution to the theft victims with the exact figure to be determined by the district attorney's office. Jake timely appealed to this Court.

I

In his first argument on appeal, Jake assigns error to the trial court's denial of his motion to suppress evidence of his statements to the police and the physical evidence uncovered as a result of those statements. He contends that the statements and evidence were obtained as a result of a custodial interrogation conducted in violation of N.C. Gen. Stat. § 7B-2101 (2005) and without his having been advised of his rights under *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

In addition to the constitutional rights set forth in *Miranda*, N.C. Gen. Stat. § 7B-2101 establishes mandatory procedures for the custodial interrogation of juvenile suspects:

> (a) Any juvenile in custody must be advised prior to questioning:

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(1) That the juvenile has a right to remain silent;

(2) That any statement the juvenile does make can be and may be used against the juvenile;

(3) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and

(4) That the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.

(b) *When the juvenile is less than 14 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney....*

(c) If the juvenile indicates in any manner and at any stage of questioning pursuant to this section that the juvenile does not wish to be questioned further, the officer shall cease questioning.

(d) Before admitting into evidence any statement resulting from custodial interrogation, the court shall find that the juvenile knowingly, willingly,

> and understandingly waived the juvenile's rights.

N.C. Gen. Stat. § 7B-2101 (emphasis added). The rights provided by both § 7B-2101 and *Miranda* apply only if the juvenile is in custody. *State v. Gaines*, 345 N.C. 647, 661, 483 S.E.2d 396, 404-05, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177, 118 S. Ct. 248 (1997).

It is undisputed that Jake was 13 years old at the time of the questioning and that no parent, guardian, custodian or attorney was present during the time Jake made any statements. "Therefore, if the juvenile's admissions were obtained during a custodial interrogation, they would be inadmissible." *J.L.B.M.*, 176 N.C. App. at 624, 627 S.E.2d at 246.

The critical question before the trial court was thus whether Jake was "in custody" at the time he made his statements. In determining whether a suspect is in custody, "the appropriate inquiry . . . is, based on the totality of the circumstances, whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *State v. Buchanan*, 353 N.C. 332, 339, 543 S.E.2d 823, 828 (2001) (internal quotation marks omitted).

This inquiry is an objective one that requires us to consider all the facts and circumstances from the perspective of a reasonable person in the juvenile's position. *In re W.R.*, __ N.C. App. _, _, 634 S.E.2d 923, 926, *temporary stay allowed*, 361 N.C. 167, 637 S.E.2d

544 (2006). While "the trial court should consider the juvenile's age in ruling on the admissibility of a confession, ... the youth of a juvenile 'will not preclude the admission of his inculpatory statement absent mistreatment or coercion by the police officers.'" *Id.* (quoting *State v. Fincher*, 309 N.C. 1, 8, 305 S.E.2d 685, 690 (1983)).

As our Supreme Court explained with respect to motions to suppress:

> When the competency of evidence is challenged and the trial judge conducts a voir dire to determine admissibility, the general rule is that he should make findings of fact to show the bases of his ruling. If there is a material conflict in the evidence on voir dire, he *must* do so in order to resolve the conflict. If there is no material conflict in the evidence on voir dire, it is not error to admit the challenged evidence without making specific findings of fact, although it is always the better practice to find all facts upon which the admissibility of the evidence depends. In that event, the necessary findings are implied from the admission of the challenged evidence.

State v. Phillips, 300 N.C. 678, 685, 268 S.E.2d 452, 457 (1980) (internal citations omitted). "Findings and conclusions are required in order that there may be a meaningful appellate review of the decision." *State v. Horner*, 310 N.C. 274, 279, 311 S.E.2d 281, 285 (1984).

More specifically, our Supreme Court has held with respect to the admissibility of a confession: "In the establishment of a factual background by which to determine whether a confession meets the tests of admissibility, the trial court must make the findings of fact." *State v. Barnes*, 264 N.C. 517, 521, 142 S.E.2d 344, 346 (1965). "Absent findings of fact, this Court is unable to say whether [the trial court] committed error in admitting the contested confession." *Id.* at 522, 142 S.E.2d at 347.

In this case, the trial court made no findings of fact — oral or written — to explain what facts and circumstances it relied upon to determine that a reasonable person in Jake's position — a 13- year-old seventh grader attending special education classes — would have believed he was free to leave the conference room while being questioned by Officer DiCostanzo. Based upon our review of the transcript, which included testimony by Jake in support of the motion to suppress, we believe the record contains a material conflict in the evidence such that we cannot presume facts to support the trial court's ruling.

The issues presented by this case are not straightforward. The State points to Officer DiCostanzo's assurances to Jake that he was not under arrest, was free to leave, and was not in custody. Yet, Jake had already made an incriminating statement prior to those assurances. With respect to statements made following the officer's representations, Jake argues that he had already been told that his case would go to court

regardless of what else occurred and that he was subject to being held in detention pending any trial. The details of what was said and what a reasonable juvenile in Jake's situation would have understood are in dispute.

Under very similar circumstances, this Court recently held that — in the absence of findings of fact — "we cannot discern whether the juvenile's admissions were made in response to custodial interrogation in violation of the juvenile's constitutional and statutory rights." *J.L.B.M.*, 176 N.C. App. at 625, 627 S.E.2d at 246. The Court "therefore remand[ed] for findings on whether the juvenile was in custody at the time of his questioning, and whether his statements were the result of interrogation." *Id.*, 627 S.E.2d at 246-47.

Without findings of fact, we are not in a position to determine whether this case more closely resembles *In re Hodge*, 153 N.C. App. 102, 568 S.E.2d 878, *appeal dismissed and disc. review denied*, 356 N.C. 613, 574 S.E.2d 681 (2002), or *W.R.* In *Hodge*, this Court concluded that a juvenile, who was interviewed in his home with his mother present, was not in custody when the investigator prefaced her questions by saying "you don't have to talk to me" and "I am not going to arrest you." 153 N.C. App. at 108-09, 568 S.E.2d at 882. In contrast, in *W.R.*, this Court held that the 14-year-old juvenile was in custody when (1) he was escorted to the assistant principal's office where he was repeatedly questioned over the course of 30 minutes by the principal, the assistant principal, and the school resource officer, who was a member of the Greensboro Police

Department, and (2) at some point in the interview, he was searched by the officer. ___ N.C. App. at ___, 634 S.E.2d at 926. This Court noted "[t]here is nothing in the record to indicate the juvenile was free to leave," and held "[g]iven the totality of these circumstances, a reasonable person standing in the place of the juvenile would have believed that he was restrained in his movement to the degree associated with a formal arrest." *Id.* at ___, 634 S.E.2d at 926-27. Neither of these cases is identical to this one. Although representations like those made by Officer DiCostanzo were made to the juvenile in *Hodge*, that interview took place in the juvenile's home and in the presence of his mother. On the other hand, *W.R.*, in contrast to this case, involved no assurances, and the juvenile was searched by a police officer prior to his making incriminating statements. Without findings of fact by the trial court, we cannot determine whether the trial court could properly conclude that this case is more similar to *Hodge* than to *W.R.* Accordingly, we remand to allow the trial court to make the findings of fact necessary to support its determination that Jake was not in custody at the time he was questioned.

II

In his second argument on appeal, Jake contends that the trial court committed reversible error when it ordered him to pay restitution "in the neighborhood of $500" with the precise amount "to be determined exactly by the D.A.'s office." Relying on *In re Schrimpsher*, 143 N.C. App. 461, 546 S.E.2d 407 (2001), Jake asserts that the court never made a determination that its restitution

order was "fair and reasonable, related to the needs of the child, and calculated to promote the best interest of the juvenile. . . ." *Id.* at 464, 546 S.E.2d at 410.[2] Given the severity of the offenses, the trial court had discretion to designate Jake as either a Level I or Level II offender. *See* N.C. Gen. Stat. § 7B-2508 (2005). Based on its decision to assign Jake to Level I, the court was authorized to "[r]equire restitution, full or partial, up to five hundred dollars ($500.00), payable within a 12-month period to any person who has suffered loss or damage as a result of the offense committed by the juvenile." N.C. Gen. Stat. § 7B-2506(4) (2005). For Level II offenders, the trial courts may impose restitution requirements in excess of $500.00. *See* N.C. Gen. Stat. §§ 7B-2506(22), -2508(d).

In the agreement leading up to Jake's admission of the allegations in the petition, the parties left to the discretion of the trial court whether Jake should receive a Level I disposition or a Level II disposition. Prior to ruling, the court heard argument regarding the appropriate level and restitution. After a discussion of the fact that the exact amount of restitution was still to

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2. We note that the juvenile does not specifically object to the trial court's decision to allow the district attorney's office to determine the precise amount of restitution. In any event, this Court has previously acknowledged this practice and found it to be acceptable under the Juvenile Code. *See In re M.A.B.*, 170 N.C. App. 192, 194, 611 S.E.2d 886, 887-88 (2005) (upholding, against challenge that such action constituted an impermissible delegation of judicial authority, trial court's decision to allow Juvenile Court Counselor to determine exact amount of restitution).

be determined, the court inquired whether Jake's counsel was taking the position that the court could not yet assign a level. After the juvenile's counsel clarified that she agreed a level could be assigned, the court stated to her: "You just want an accurate amount of restitution." The juvenile's counsel replied: "Well, and I thought that that might be determinative of the Court in what level [sic] and I would argue that this is a Level I because the restitution is slightly under $500." The State argued in response that Level II was appropriate based on the nature of the offense. The trial court ultimately imposed a Level I disposition and provided that Jake was "to pay his share of the restitution," which was estimated "to be in the neighborhood of $500."

We hold that the juvenile, through counsel, acknowledged that a payment of restitution was appropriate and specifically used the amount of restitution to argue successfully in favor of a lesser offender level. Moreover, there is nothing in the record to suggest that the amount of restitution was arbitrary or that Jake ever opposed the restitution award at trial on any basis. *See, e.g.*, N.C. Gen. Stat. § 7B-2506(4) ("the court shall not require the juvenile to make restitution if the juvenile satisfies the court that the juvenile does not have, and could not reasonably acquire, the means to make restitution"). Given defense counsel's agreement with the order of restitution, we conclude that the order is supported by the record and comports with *Schrimpsher*.

Affirmed in part and remanded in part.
Judges CALABRIA and JACKSON concur.
Report per Rule 30(e).

APPENDIX F — MOTION TO SUPPRESS STATEMENTS AND EVIDENCE SEIZED AND REQUEST FOR HEARING FILED DECEMBER 1, 2005

STATE OF NORTH CAROLINA
COUNTY OF ORANGE

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION

FILE NO. 05 JB 115

STATE OF NORTH CAROLINA

vs.

J[OMITTED] B[OMITTED]
A JUVENILE

MOTION TO SUPPRESS STATEMENTS AND EVIDENCE SEIZED AND REQUEST FOR HEARING

NOW COMES Juvenile, by and through undersigned counsel, and moves this Court pursuant to N.C. Gen. Stat. § 7B – 2101, the 4th, 5th, 6th and 14th Amendments of the United State Constitution and the Constitution of North Carolina Article I, 19, 23 and 27 and North Carolina General Statues 15A-971 et seq. to suppress all statements and physical evidence taken from the Juvenile on the date of September 29, 2005, which the Juvenile is informed, believes and alleges the

State intends to use at the adjudicatory hearing of this case.

The statements and physical evidence were obtained in violation of the juvenile's rights under the North Carolina Juvenile Code, and the United States and North Carolina Constitutions. Specifically, the Juvenile, was interrogated by police in a custodial setting without being afforded *Miranda* warning and without a parent or guardian being present. After giving an inculpatory statement, the Juvenile then proceeded to turn over items that the State will seek to introduce into evidence. These actions flowed from the initial unlawful interrogation and therefore were derivative evidence and fall under the fruit of the poisonous tree doctrine. *Wong Sun v. United States*, 371 U.S. 471 (1963). As a result, the statements and the evidence that flowed from the statements should be suppressed. In further support of this Motion, the Juvenile presents the affidavit that is incorporated herein by reference. The Juvenile further requests an evidentiary hearing on this motion prior to the adjudicatory hearing.

This the 1st day of December, 2005.

/s/
Caitlin Fenhagen
Attorney for the Juvenile

Appendix F

STATE OF NORTH CAROLINA
COUNTY OF ORANGE

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION

FILED NO. 05 JB 115

STATE OF NORTH CAROLINA

vs.

J[OMITTED] B[OMITTED]

AFFIDAVIT

I, Caitlin Fenhagen, after being duly sworn depose and say as follows:

1. I am an attorney licensed to practice law in the State of North Carolina and am presently employed as an Assistant Public Defender in the Office of the Public Defender for District 15B. I am assigned to represent J[OMITTED] B[OMITTED], a Juvenile, who is 13 years old and a 7th grader in the special education program at Smith Middle School.

2. The Juvenile is charged with two cases of Felonious Breaking and Entering and Larceny after Breaking and Entering of two residences in Chapel Hill on September 24, 2005.

3. A probable cause hearing was held in this case on November 8, 2005. At that time Investigator DiCostanzo of the Chapel Hill Police Department testified. Discovery was provided to defense counsel on November 16, 2005. The following information was obtained from the hearing and the discovery.

a. Investigator DiCostanzo testified that he was assigned on September 26, 2005 to investigate break ins and larcenies at two residences on September 24, 2005. The residences were 105 and 120 Winsor Circle in Chapel Hill. The owners were not home at the time of the break ins and various items of jewelry and a camera and cell phone were missing. Two juveniles had been seen near the homes that day and had been briefly detained and then released. One was J[OMITTED] B[OMITTED].

b. On September 28, 2005, the Investigator spoke to one of the victims who identified Mr. B[OMITTED] as one of the boys detained and that she knew him and had seen him outside her home before and that he was seen by the other neighbors knocking on doors that date in question. On September 29, 2005, the Investigator showed pictures of students to the officers who made the detention and he identified J[OMITTED] B[OMITTED] as one of the boys he had stopped. The same day, a school resource officer at Smith Middle School called and said that a female student had found a camera that she had seen with J[OMITTED] B[OMITTED] previously. The serial number matched the one taken from 120 Winsor Circle.

c. The Investigator went to Smith Middle School and spoke first to the girl who found the camera. She identified Mr. B[OMITTED] as having it before she found and kept it. Another female student also told the Investigator that she has seen Mr. B[OMITTED] with the camera. The Principal at Smith, David Lyons, went and retrieved Mr. B[OMITTED] from this class. The Investigator placed him in a closed room with him and the Principal. The Investigator asked Mr. B[OMITTED] if he wanted to talk about the incident and he said he would. He then denied going into the homes. At that point, the Principal began telling Mr. B[OMITTED] to tell the truth and do the right thing. Mr. B[OMITTED] asked if he was going to get in trouble and the investigator then told him to come clean and told him he was going to look into getting a secure custody order. Mr. B[OMITTED] asked what that meant and the investigator explained secure custody, and then added he did not have to speak to him and even could leave. It was after this exchange that Mr. B[OMITTED] allegedly "blurted" out a confession. He then agreed to write a statement also. At no time during this exchange was Mr. B[OMITTED] a 13 year old special ed student, advised of this Miranda rights or offered the opportunity to speak to a parent or lawyer.

d. Later that afternoon, officers met Mr. B[OMITTED] at his home when he got off the school bus. No one else was at the home. The Investigator states that Mr. B[OMITTED] provided officers at the scene several pieces of jewelry and a camera case that was in the home. Mr. B[OMITTED] also took officers to

a nearby gas station and recovered additional items and turned them over.

4. North Carolina Juvenile Code § 7B – 2101 governs the interrogation of juveniles. It requires that any juvenile in custody, or its functional equivalent, must be advised of his Miranda rights and must be advised that he has a right to the presence of a parent or custodian prior to questioning. Section (B) specifically states that when a juvenile is less that 14, no confession resulting from interrogation may be admitted in evidence unless it was made in the presence of the parent, custodian or attorney.

5. Upon information and belief from conversations with Mr. B[OMITTED] and his family, the investigator never advised Mr. B[OMITTED] of his Miranda right's and never contacted a parent or guardian before beginning questioning. Mr. B[OMITTED], who intellectually does not function at even a 13 year old level, certainly did not feel he was free to leave having been placed in a room with a police officer and his Principal and after being advised to confess by both and even being threatened with secure detention. This was the functional equivalent of a custodial and highly coercive setting.

6. The Investigator came to the school to question Mr. B[OMITTED] He was the focus of his investigation at that point. This was not a school-related incident and the school resource officer was not involved. This was an investigation of residential break in. His actions

amounted to a denial of due process and fundamental fairness and constituted custodial interrogation and as a result, all the statements by Mr. B[OMITTED] should be suppressed. To find otherwise, would contravene the statutory and constitutional protections specifically in place to protect our most vulnerable citizens. The physical evidence that was turned over by Mr. B[OMITTED] after the unlawfully obtained statement clearly derived from that statement and were fruit of the poisonous tree and should be excluded.

Further affiant sayeth not.

/s/
Caitlin Fenhagen

Sworn to and subscribed before me
this the 1st day of December, 2005.

/s/
Notary Public
My commission expires: 2/29/08

APPENDIX G — JUVENILE ORDER IN THE GENERAL COURT OF JUSTICE, DISTRICT COURT DIVISION, STATE OF NORTH CAROLINA, ORANGE COUNTY DATED DECEMBER 13, 2005

STATE OF NORTH CAROLINA
ORANGE COUNTY
In the General court of Justice
District Court Division

File No. 05 JB 1

JUVENILE ORDER

IN THE MATTER OF:

Name and Address of Juvenile:

J[OMITTED] D[OMITTED] B[OMITTED]
BY ORANGE COUNTY, C.S.C.

Social Security No. of Juvenile:
[BLANK]

Juvenile's Date of Birth:
[OMITTED] – 1991 Age- 14 Race-B Sex-M
G.S. CH 7

AFTER HEARING EVIDENCE FROM INVESTIGATOR JOE DICOSTANZO AND THE JUVENILE, THE JUVENILE'S MOTION TO SUPPRESS STATEMENTS AND EVIDENCE SEIZED IS DENIED. ADJ/DISP IS SET FOR 1-24-2006 AT 9:00 A.M.

Appendix G

CC: JACQUELINE PEREZ, ADA
CAITLIN FENHAGEN, JUV. ATTY
DJJ

Date
12-13-2005

Name of Presiding Judge (Type or Print)
JOSEPH M. BUCKNER

Signature of Presiding Judge
/s/

APPENDIX H — ORDER ON MOTION TO SUPRESS IN THE GENERAL COURT OF JUSTICE, DISTRICT COURT DIVISION, NORTH CAROLINA, ORANGE COUNTY DATED DECEMBER 13, 2005

NORTH CAROLINA
ORANGE COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
05 JB 115

ORDER ON MOTION TO SUPRESS

In the matter of

J[OMITTED] D[OMITTED] B[OMITTED]
Juvenile

THIS suppression motion having been heard before the Honorable Joseph Moody Buckner, this 13th day of December 2005, and after hearing evidence from the State and the Defendant, the Court makes the following:

FINDINGS OF FACT

1. On September 24, 2005, the homes of Paula Hemmer and Jeff Sekelesky were broken into and various items were stolen, including jewelry a digital camera.

2. The Juvenile, at the time 13 years old, was interviewed by police on the same day as the break-

ins after he was seen behind a residence in the same neighborhood.

3. It was later that the police were informed that the juvenile had been seen in possession of a digital camera at school which camera turned out to be camera stolen from Mr. Sekelesky.

4. Investigator Joseph DiCostanzo of the Chapel Hill Police Department was assigned the investigation and went to the juvenile's school to speak with him.

5. The juvenile is in seventh grade and enrolled in special education classes.

6. The juvenile was escorted from his class and into a conference room to be interviewed. Present in the room were Investigator DiCostanzo, Assistant Principal David Lyons, a school resource officer and an intern. The door was closed, but not locked.

7. The juvenile was not administered Miranda warning and was not offered the opportunity to speak to a parent or guardian prior to the commencement of questioning. Additionally, no parent or guardian was contacted prior to the juvenile's removal from class.

8. Investigator DiCostanzo asked the juvenile if he would agree to answer questions about recent break-ins. The juvenile consented.

9. The juvenile stated that he had been in the neighborhood looking for work mowing lawns and initially denied any criminal activity.

10. Mr. Lyons then encouraged the juvenile to "do the right thing" and tell the truth.

11. The investigator questioned him further and confronted him with the fact that the camera had been found.

12. Upon the juvenile's inquiry as to whether he would still be in trouble if he gave the items back, the investigator responded that it would be helpful, but that the matter was still going to court and that he may have to seek a secure custody order.

13. The juvenile then confessed to entering the houses and taking certain items together with another juvenile.

14. The investigator informed the juvenile that he did not have to speak with him and that he was free to leave. He asked him if understood that he was not under arrest and did not have to talk with the investigator.

15. The juvenile indicated by nodding "yes" that he understood that he did not have to talk to the officer and that he was free to leave. He continued to provide more details regarding where certain items could be located.

16. The juvenile wrote a statement regarding his involvement in the crime.

17. The bell rang signaling the end of the day and the juvenile was allowed to leave to catch his bus home.

18. The interview lasted from 30 to 45 minutes.

19. The investigator had informed the juvenile that he would see him later and would be speaking to his grandmother and aunt.

20. Investigator DiCostanzo and Officer Hunter went to the home of the juvenile, but found no one home. When the juvenile arrived, he told the officers they could look around and he would show them where the jewelry was located.

21. Investigator DiCostanzo informed the juvenile that he needed to obtain a search warrant and left Officer Hunter to wait outside the juvenile's home.

22. While awaiting the search warrant, the juvenile brought a ring to the officer from inside the home.

23. Upon the investigator's return with the warrant, the juvenile entered the home with the officers and handed them several stolen items and led the investigator to where other items could be found on the roof of a gas station down the road. During the entire time that the officers were at his residence and travelling with him to the BP station, no parent

or guardian was contacted or advised of the situation. The juvenile was not advised of his Miranda warnings or told he had the right to speak to or have a parent or guardian present.

24. Investigator DiCostanzo left his card and a copy of the search warrant at the juvenile's residence.

25. All of the juvenile's responses to the officer's questions were appropriately responsive, indicating that he was capable of understanding the fact that he did not have to answer questions.

26. All of the juvenile's responses to counsel during the suppression hearing were appropriately responsive.

From the foregoing findings of fact, the Court makes the following:

CONCLUSIONS OF LAW

1. The juvenile was not in custody when he was brought to the conference room to speak to the investigator.

2. The mere presence of the investigator and the school resource officer did not convert the meeting into a custodial interrogation.

3. The juvenile was informed that he was free to leave and that he did not have to answer any questions, but chose to stay and volunteer more information.

4. The juvenile was not in custody when he arrived home and invited the officers into his home to search.

5. The juvenile was not in custody when he gave the ring to Officer Hunter while Office Hunter waited outside the home for Investigator DiCostanzo to return with a search warrant.

6. The Juvenile was not in custody when he gave the officers other stolen items from his house after the investigator returned with the search warrant.

7. The Juvenile was not in custody when he led Investigator DiConstanzo to the location of jewelry left on the roof of a gas station.

8. Based on the totality of the circumstances, all statements made by the juvenile and actions taken by the juvenile in the presence of the law enforcement officers were voluntary.

ORDER

IT IS HEREBY ORDERED, that the Defendant's motion to suppress the evidence in this case is denied.

This the 13th day of December, 2005.

Nunc pro tunc

/s/
Hon. Joseph Moody Buckner

APPENDIX I — TRANSCRIPT IN THE GENERAL COURT OF JUSTICE, DISTRICT COURT DIVISION, NORTH CAROLINA, ORANGE COUNTY DATED FEBRUARY 27, 2006

[1] NORTH CAROLINA
ORANGE COUNTY

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO.: 05-JB-115

IN THE MATTER OF:

J[OMITTED] D[OMITTED] B[OMITTED]

Transcript of the hearing heard on the 13th day of December, 2005, at the Courthouse in Orange County, Hillsborough, North Carolina before the Honorable Joseph Buckner, Judge Presiding.

[3] (December 13, 2005)

(Other motion in [OMITTED] matter heard.)

COURT: What's the other motion?

MS. PEREZ: Your Honor, the other motion is in J[OMITTED] B[OMITTED]'s matter and I believe it's generally separate from Mr. [OMITTED]'s matter, is that correct?

UNIDENTIFIED: Yes.

MS. FENHAGEN: Your Honor, I represent J[OMITTED] B[OMITTED] and I have a motion to suppress both statements as well as physical evidence that was obtained from my client.

COURT: Okay. What's the basis of that motion?

MS. FENHAGEN: Your Honor, I filed a written motion and the basis is that there was the equivalent of custodial interrogation. My client was taken out of class at school by an officer who came to the school. It was not a school-related incident per se. He was - the officer never called a parent or guardian before speaking to him. My client was threatened with detention before making a statement. He was then, after that, followed home, met at the school bus. At that time items were obtained from my client. He was - still no parent or guardian was ever contacted. He was then taken actually in a police car around to various locations. Again, still no parent having [4] been contacted. My client was thirteen at this time. He was also in special education. And I would argue that all the physical evidence that was derived was fruit of the original, unlawful statement that was taken at the school. And, Your Honor, I argued under two prongs; both that this was custodial interrogation, that because he was thirteen the statute requires that a parent or guardian be notified. Further, if the Court finds that there wasn't what the Court would consider custody in this situation, I would argue that the statement was not knowing and voluntarily given, but coercion that was used that preceded the statement, as well as my client's age and functioning.

COURT: What's the state's position on that issue?

MS. PEREZ: Your Honor, the State's position is that the juvenile was not in custody. And the relative statute is 7B-2101 for interrogation procedures. But that would be for a juvenile who is in custody. I do have evidence I could present. I have the school officials here, and the school resource officer, and Officer DiCostanzo who did the questioning of Mr. B[OMITTED] and to provide the background information for the Court to hear, whether or not the Court would determine the juveniles had been in custody. But our position is that he was not in custody at the time.

MS. FENHAGEN: Your Honor, again, I would [5] argue that this was custodial. I have case law. But additionally, even if the Court finds that this wasn't custodial, then I would say that it's not admissible given the fact that it wasn't knowing and voluntary and given the circumstances that existed here.

COURT: I guess I need to hear from your witnesses, Ms. Perez.

MS. PEREZ: Thank you, Your Honor. I would start with Investigator DiCostanzo and follow up with the school personnel to provide the basis.

INVESTIGATOR DiCOSTANZO,

having been first duly sworn, on oath, testified as follows on:

Appendix I

DIRECT EXAMINATION BY MS. PEREZ:

MS. PEREZ: Perhaps if I may address one issue before we start, Your Honor. In light of hearing evidence in this case at this point I would like to release the witnesses who would be needed for trial since I don't believe we could go forward with a trial after this hearing.

COURT: Okay. Why don't you confer with them and make sure you have a convenient date.

(Pause in the proceeding.)

Q And you're Investigator DiCostanzo with the Chapel Hill Police Department?

A Yes, ma'am.

[6] Q And Investigator DiCostanzo, you were sent to investigate a break-in from September 24th – that occurred September 24th?

A That's correct.

Q And can you tell the Court how you became involved in the investigation of this case?

A On Monday the 26th, I was given the report in briefing and assigned the case by my supervisor and began the investigation.

Q And what did you do to begin your investigation?

A After reading through the report I decided to talk to the victims of the case and also try to identify in particular who actually was stopped. That day that the report came in there was a report of two juveniles peeping in the back of a residence that were stopped and identified and the names were given. One of the names given was a [OMITTED] B[OMITTED] and then I'd gotten information from one of the victims, Ms. Hemmer, that she didn't know if there was a [OMITTED] that lived there but she was sure of a J[OMITTED] that used to cut her grass. And so I wanted to make sure that I had the right people that I was dealing with as far as the juveniles that were there that day.

Q And were you able to make your determination as to the individuals you were looking for?

A Yes, ma'am. What I did was I had Officer Andy Ennis [7] who was there that day and stopped the juveniles flip through some pictures from Smith Middle School's year book and I asked him to see if he could identify anyone that he spoke to on the 24th at Windsor Circle. And he did so. He pointed out J[OMITTED] D[OMITTED] B[OMITTED] and said that that was one of the two boys stopped and the one in particular that said his name was [OMITTED] B[OMITTED].

Q And what did you do with that information?

A I followed up with - actually, I received the phone call from Officer Curt Garley at the Middle School. That

was on the 29th at 9:30. He called me and said that a digital camera had been found at school and he wanted to know if it matched up with one of the cameras that were taken from the residential break-in.

Q And did you respond to the school that day?

A Yes, I did.

Q While you were at the school, did you speak with J[OMITTED] B[OMITTED]?

A I did.

Q And can you tell the Court how that occurred?

A Yes. When I got to the school, I met with Officer Curt Gurley and Mr. Lyons, the Assistant Principal, as well as one of his interns, I believe. I believe his name is Mr. Benson. And because the camera was found at school and the way that it was found - a parent had brought it back and [8] there was some question as to how [OMITTED] (phonetic) had gotten the phone - I mean, the camera from J[OMITTED] and how it was associated there, he wanted to know if he could be a part of the interview and I said sure, it happened at school.

Q Who is he?

A Mr. Lyons.

Q Mr. Lyons.

A So we all decided to do an interview together, Mr. Lyons, Mr. Benson, Officer Gurley and myself.

Q And how did - was [OMITTED] - I'm sorry, was J[OMITTED] in class at the time?

A I believe he was. It was around lunch-time. I'm not sure if he was taken out of class or if he was in - which class he was in or anything like that. I said, you know, it basically won't take too long, let's figure out what happened since it happened at school. And one of them went and got him out.

Q One of them?

A Either Mr. Lyons or Mr. Gurley did.

Q Went to get him?

A Um hmm, that's correct.

Q And so can you describe the area where this interview took place?

A Sure. It's a large conference area. It's a large [9] table, probably seats about twelve. J[OMITTED] was sitting closest to the door on the left-hand side of the table and I was sitting around the corner at the end of the table. Mr. Lyons was over to the right. Mr. Benson was back towards the back, and Officer Gurley was towards the window in the rear of the office. It's in the - when you walk in Smith Middle School, it's right near

the main desk down the hallway. There's a conference room and it's back in there.

Q When he arrived, can you tell the Court what ensued?

A Yes. I actually had talked with [OMITTED] and [OMITTED] (phonetic), two of the witnesses first and got -

Q (Interposing) In the same room?

A Yeah, in the same room, and gotten their statements first 'cause I wanted to get all the background information. And then Mr. Lyons went and got J[OMITTED]. And I basically just introduced myself, said I wanted to follow up what happened when he met with the police officers last weekend. I asked him if he wanted to talk with me about it and he said, sure. He said it really wasn't a big deal. He mows people's yards and was going around asking anyone if they needed their yard mowed. And then the police stopped him and he went home.

Q And did you follow up the other information at that point?

A Yes, I did. I basically just asked him for a little [10] more detail, said, you know, which house did you go to first. He said that he and [OMITTED] went to Paula Hemmer's house first. That's actually one of the victim's houses. He said that Paula was a regular customer so

he went there first but she wasn't home. J[OMITTED] said that last week he had put some slips out asking anyone if they needed help walking their dogs. He said that after they left Paula's house he went to a bunch of houses and that, quote, some of them said, wait till my mom comes back. J[OMITTED] said that they went to the front doors of the houses and they didn't call first. He said that - J[OMITTED] said they didn't go into any houses except for the one house, where, quote, unquote, the dude lives, the one who said, you can wait for my mom to come home. I then asked J[OMITTED], tell me about the time that Paula came home from a walk and he and his brother had been in the back of her house. J[OMITTED] said that he was cutting through. He also said that he asked Paula about cutting her grass then, I mean, that day. I told J[OMITTED] that I spoke with Paula and that Ms. Hemmer told me that she had lost her job and that she had told him, J[OMITTED], that she wasn't going to use him for yard service this entire year. And he didn't say anything to that to me. And then I proceeded to tell J[OMITTED] that I had the camera that was taken from one of the residents in the neighborhood. And it was also the same [11] residence that he was seen looking into the back window of. So that day when the officer stopped J[OMITTED] and [OMITTED], the house that they actually saw him looking into was not Ms. Hemmer's house; it was actually Mr. Sackelski's house who - that's why there's two counts. And that the house they actually were seen looking into was the one where the camera was missing, also the one that was identified as by [OMITTED] as been in possession by J[OMITTED].

Q Did he make any response to this - you having found the camera?

A He really remained quiet at that point in time. He just kinda - like he wasn't sure what he wanted to say. And that's when Mr. Lyons, you know, was encouraging him, said that he had had long conversations with J[OMITTED], said he really wanted J[OMITTED] to do the right thing because the truth always comes out in the end. J[OMITTED] asked at this point if he got the stuff back was he still gonna be in trouble. And I told J[OMITTED] that it would help to get the items back but that, quote, this thing is going to court. I specifically said, what's done is done, J[OMITTED], now you need to help yourself by making it right. I told J[OMITTED] that with the information that I had been given, that if I felt that he was going to go out and break into other people's houses again because he really didn't care, then I would have to look at getting a secure custody order. And [12] he asked what that was. And I explained to him that it's where you get sent to juvenile detention before court. And at that time I said, J[OMITTED], you don't have to speak to me; you don't have to talk to me; if you want to get up and leave, you can do so, but that I hoped that he would listen to what I had to say. And I said to him, do you understand you're not under arrest and you don't have to talk to me about this. He nodded his head yes, and that's when he just started rambling really quickly about that he had taken the camera and [OMITTED] had the cell phone. And then he said that he and [OMITTED] had gone into the house and taken both the camera and a cell phone.

That's when he started saying it was [OMITTED]'s idea and that [OMITTED] had the cell phone and charger at his residence. He denied knowing where [OMITTED] lived at that time. I asked J[OMITTED] about the other residence and he said that [OMITTED] had all the jewelry. I asked him to tell me more about how they went into the residence, you know, if it was unlocked, and what the room looked like and he gave me specific details about it being unlocked and that there was a tiny dresser thing with a little drawer in it, and that J[OMITTED] said that he put the jewelry in his pocket. At the other house, [OMITTED]took the cell phone and - this is what J[OMITTED] said, and told J[OMITTED], you have this one, and gave him the camera. And that's when I asked J[OMITTED], why did he take certain [13] things and leave other more valuable things alone, like a laptop computer and things like that. And J[OMITTED] said he didn't know what to go for, this was his first time. If he had done it before, maybe he would know what to take. So he said he put the jewelry and items into a book bag and left it outside his house when the police stopped him a little while later. I told J[OMITTED] I had written down some notes about what he had said but I wanted to make sure I understood and I asked him if he would mind writing it down for me. He said, okay. He wrote a brief statement saying, Sunday me and [OMITTED] went to Paula's house and stole cell phone and camera and he stole some jewelry. The jewelry was taken out of Paula's house and we went back home and put it in the book bag. Signed, J[OMITTED] B[OMITTED], and he put a little statement underneath that, I'm gonna get [OMITTED] to give the jewelry back. The bell rang and

I asked J[OMITTED] how he normally gets home. He said he usually rides the bus.

Q So this was the end of the day?

A Yes. When I first arrived there it was shortly after lunch, but after talking to the two other girls, the witnesses, it was getting on towards the end of the day. So J[OMITTED], I told him to go before he missed the bus. I asked him to look me in the eyes and promise me that he wouldn't do it again. He said, yes. I told him I would see [14] him in a little while and talk with his grandmother and aunt about what happened. I let him go and I left.

Q Before you started the interview, did you make any preliminary comments to him?

A About?

Q Just about why you were there and if he was –

A (Interposing) There was - no, there was some small discussion about, you know, I think he told me he was the oldest, had some younger brothers and sisters. And I mentioned, you know, it must be hard to be little man, he said, yeah. I think I asked him a little bit about some sports. I said, you know, - talking about football or something 'cause he's a big guy, and we just small talked for a little bit.

Q And did the subject of - you mentioned that you had talked about how if you found that he had done this

again, you would look for a secure custody order. Did the subject of him - of arrest come up during this conversation?

A No.

Q Did he ask about being arrested?

A No.

Q Did you discuss custody with him at all?

A No.

Q At any time during this meeting, did he mention anything about wanting to have a parent around or not –

[15] A (Interposing) No.

Q - wanting to be there?

A No.

Q Did he try to leave at any time?

A No, he did not.

Q And during the whole time you were talking with him, you said that Mr. Lyons encouraged him to do the right thing. Was there any other time when Mr. Lyons was talking to him or asking him questions?

A I don't think he did. I encouraged Mr. Lyons if he wanted to have any involvement or ask any questions if I didn't answer all the questions through my discussions with J[OMITTED] that, please feel free. I recall that one moment where he was talking to him and encouraging him, stuck out in my mind, but I can't remember if he said anything else.

Q Do you recall if Officer Gurley or Mr. Benson said anything to -

A (Interposing) They did not. I think at one point I asked Officer Gurley just to - he was over by the window and I said, could you just hold up the camera to show J[OMITTED] that, you know, the camera was actually located.

Q Can you describe J[OMITTED]'s demeanor during this whole interview?

A He was surprisingly calm, spoke clearly, asked questions when he needed to.

[16] Q How long did the interview last?

A It lasted approximately anywhere from 30 to 45 minutes.

Q And now you said that you then told him to catch his bus home?

A Yes, I did.

Q And did anything else occur after that?

A Yes. I had been working on typing up a search warrant. Based on the fact that the initial officers, when they talked with the family about what had happened with J[OMITTED] and [OMITTED]; when I talked to J[OMITTED]'s family, there was some resistance and some, I would say, some hostility to be perfectly honest. There was some accusations that it could be racially motivated for them being stopped, and there seemed to be some lack of communication between the two parties. And I didn't know if I was gonna get cooperation with looking in the residence if I needed to find anything else. So I typed up a search warrant at that time to be executed if need be. So during this time I had been typing it up, so when I left the school it had been typed, but it hadn't been signed by a Magistrate yet. I felt like after talking with J[OMITTED], I could go on down to the Magistrate and based on what I'd already put in the search warrant, go ahead and get it signed and then go and have it served.

Q So what happened? Did you end up having to get it [17] signed?

A Yes, I did. I went back to the Magistrate, had it signed. Actually, I dropped off Investigator Jay Hunter. I went down to the Police Department, picked him up, and my supervisor said, you know, what's going on, and I explained that I had let J[OMITTED] go and he said, well, you have the search warrant, and I said, yeah, but it's not signed. And he said, you know, basically, I can't

believe you just let him go. He said, you know, what if he goes home and gets rid of the evidence. And I said, well, I don't think he will. He seemed like he's cooperating. So at that point he, said, well, you need to go over there and, you know, maybe just talk to the grandmother, explain you're going to get a search warrant and just kind of have someone hang around. So I had Investigator Hunter go up to the residence, I drove him over there, dropped him off. He knocked on the door, no one was home. And then J[OMITTED] had gotten off the bus and came home. He said, y'all can go ahead and look around; I'll show you where the jewelry is. And I said, no one's home to give us permission, you can't give us consent to search this residence. I need to go back to get the search warrant so do you mind staying here with Investigator Hunter. They waited outside in the carport - it's an open carport and I went back and that's when I got it signed. And then I came back up, still no one was home. And then [18] J[OMITTED] at that time had actually pulled a ring out of his pocket, one of the ones from Ms. Hemmer's residence that wasn't even from inside the residence. It actually was in his pocket and given it to Investigator Hunter. When I came back he said, here, I want to give it to you. Investigator Hunter said, J[OMITTED] just gave this to me. I said, well, will you write a supplement to the report as to what happened. And then we went in and J[OMITTED] took us right to different places where he had hidden the jewelry and we didn't have to search at all really. He just went and got it, brought it back to us. Said he thought one more piece of jewelry was in there but he couldn't find it. And he said, oh, I remember, I threw

some stuff up on top of the shed at the BP and I said, oh, well, do you want to go down there and show me where it is? And he said, yeah. So we walked down the street, which is just around the corner, down Windsor to Critz (phonetic), and that just one street over is the BP gas station. And on top of the shed, sure enough, there was some jewelry. And so I climbed up there and got it down.

Q Where did he go after that?

A We were walking back. I said, do you want to walk around and just show me how you went around the residence. And there was some garden gloves right next to the side door of Ms. Hemmer's house, and he said, you know, the gloves [19] were there and we walked through here. He showed me how he walked around the bed. And they went into the front door which he said was unlocked and they left and saw a car and got scared and he said they ran around to the back and hid behind some flowers, and then walked straight out the front back to Windsor, and then walked home which is just two houses down on Windsor on the left-hand side.

Q And so did he walk home at that point?

A Yup, we walked home. Again, still no one was there. And I said, you know, the rest of the jewelry, if there is any that [OMITTED] has and the cell phone, I'd like to get that back. You're cooperating now. He said, well, - J[OMITTED] said straight up honest to me, he said, look, if you go over there to [OMITTED]'s he's not

gonna - he's probably not gonna talk to you. If I go with you, then I can get - I probably can get it back. And I said, okay. And we left a note with my business card on the kitchen table. And I said, do you want me to just give you a ride over there. He said, yeah, he said he did know where it was; not like before where he said he didn't know where. We drove over to Oak Avenue, went right to the apartment and knocked. No one came to the door. We came back, got in the car, drove back, dropped him off. I left the search warrant on the living room table against the wall. I don't think it was left there until the grandmother or the aunt came home because the next day when [20] I talked to the grandmother, I said, did you get the search warrant and she said, I finally found it. It made me feel that maybe it had been moved and she had some issues. Because I think initially they thought that we just went in there and did whatever we wanted to do. So she said, I finally found it. And I said, okay. And I talked about it. And that's when she informed me that J[OMITTED] had said that [OMITTED] was gonna beat his butt if J[OMITTED] didn't do it, and that [OMITTED] was the one with the gloves, according to the grandmother. And I said, okay. And I wrote that down. And asked if she had any more questions and she said no.

Q Now at any time while you were with J[OMITTED], did you tell him that he was under arrest?

A No.

Q Did you ever tell him that he was not under arrest?

A Yes, I did. Actually, at the school, in my discussions with talking about, you know, that he didn't have to talk to me, and explaining that this thing is going to court, I specifically told him that he could get up and leave if he wanted to, but I hoped that he would listen to what I was saying. And I told him, you understand you are not under arrest and you don't have to talk to me about this. And that's when he nodded yes.

Q He nodded?

A He nodded yes.

[21] Q And at any time at the residence did he ask you if he was under arrest or was going to be arrested?

A No.

MS. PEREZ: Your Honor, I don't have any other questions?

COURT: Mr. Fenhagen?

CROSS EXAMINATION BY MS. FENHAGEN:

Q Officer DiCostanzo, you were assigned this investigation on September 26th which was two days after the alleged incident?

A The Monday - the incident occurred on a Saturday and I was given the case Monday morning.

Q Okay. And you were assigned to investigate the breaking and enterings of two residences, right?

A Um hmm, yes, ma'am.

Q Not a school incident?

A No, ma'am.

Q And you received information from a complainant by the name of Paula Hemmer who provided my client's name to you as somebody who lived in the neighborhood and was a possible suspect?

A Yes, ma'am.

Q And then you also spoke to Officer Ennis who I think you showed a yearbook to and he identified J[OMITTED] B[OMITTED] as the person he had stopped briefly that day?

[22] A Yes.

Q So then you received information from Officer Gurley at the school regarding a camera that had been found at the school?

A Yes.

Q And you then came to the school and interviewed two female students from the school that indicated that they had seen my client with that camera?

A Yes.

Q And that client matched - I'm sorry, that camera serial number matched one that had been taken from one of the two residences?

A It was the one that they were actually seen looking in the back of, yes.

Q So at this point, by the time you arrived at the school, obviously Mr. B[OMITTED] is the focus of your investigation as to a possible suspect of the breaking and enterings?

A Yes.

Q And you spoke to - I think you spoke to Officer Gurley and the principal when you arrived at the school?

A I did.

Q And it was Assistant Principal Lyons that actually went and found Mr. B[OMITTED]?

A I'm not sure which one did. It was either Officer [23] Gurley or Mr. Lyons.

Q And prior to them doing that, did you talk to them at all about J[OMITTED] B[OMITTED], like whether he –

A (Interposing) I definitely told them that I had information that I believed that he was involved in the break-in.

Q Did you ask him about whether he was in special education?

A No, I did not.

Q Did you know - you knew he was thirteen at this time?

A Yeah, I knew his date - his date of birth was given incorrectly at first, but I knew after going to the school what his approximate date of birth and age was.

Q And you knew he was thirteen?

A Yes.

Q And prior to them getting him out of class or lunch, you never contacted a parent or guardian, did you?

A No.

Q Did you ask the school for that information?

A I know that I talked to Officer Gurley to make sure he could check the school records for the correct addresses and parent contact information at that school that day.

Q So did you get the contact information?

A I believe it matched up with what was already given, I believe, that day. The officer stopped J[OMITTED], he did [24] speak with the aunt and the grandmother and I believe they got down the - they took down their information and it matched up.

Q So you had contact information both from Officer Ennis and also from the school?

A The initial report, yes.

Q And there were addresses and phone numbers for –

A Um hmm (affirmatively).

Q - and names of guardian and parents and ... Okay. I'm sorry, you have to answer audibly. Was that a yes?

A Say again?

Q Was that a yes to that last question?

A Yes.

Q And in fact, Mr. B[OMITTED] lives with his grandmother who is his legal guardian, is that your understanding?

A That is correct.

Q And that's Thelma Jones?

A Um hmm (affirmatively).

Q And once he was taken out of wherever he was, he was brought into the principal's office?

A No, ma'am. It was a large conference room.

Q He didn't go to the principal's office before going to the –

A (Interposing) No.

Q - conference room?

[25] A No, ma' am.

Q You were already in the conference room –

A (Interposing) Yes, ma'am.

Q - when he was brought in?

A Yes.

Q And there was, I think you said, Mr. Benson, Officer Gurley, Assistant Principal Lyons, and then yourself?

A That is correct.

Q And Officer Gurley was in uniform, I assume?

A Yes, he was.

Q And did you have a badge?

A I had a suit jacket on with my tie and slacks.

Q And you identified yourself as an investigator with the Chapel Hill Police Department?

A Juvenile Investigator, yes, ma'am.

Q And at that point you then started, I think you said, you made some small talk and said you wanted to talk about the two days before when he had been stopped by Officer Ennis?

A Um hmm (affirmatively).

Q And at that point, he started telling you - or you said, would you be willing to talk to me about that? And he said, yes, or sure.

A That's right.

Q And then you started talking - He started telling you [26] about he had been to several of these houses, but obviously denying that he'd been inside any of the houses that were in question here, right?

A Right.

Q And he continued to give more detail after you questioned him a little bit further, he continued to give more detail about going to these houses and going around looking for work but not doing anything of a criminal nature, correct?

A That is what he was saying, yes.

Q And that went on for approximately 15 or 20 minutes or so, is that fair to say?

A Somewhere around that time; probably a little bit less.

Q And it was only after you were getting nowhere with that in terms of any incriminating information, but that's when I think you said Assistant Principal Lyons then started talking about the importance of telling the truth and coming forward and accepting –

A (Interposing) Actually, I'd gotten quite a bit of information. When J[OMITTED] was - when I was asking my questions, by him putting himself only at the front doors, by saying he didn't call first, by saying he never went to the back of the residences, by his explanation of what happened, when he was seen at Ms. Hemmer's residence a week prior, and then going back to one guy's house three times [27] and his mother still wasn't home, I was actually getting a lot of information that was corroborating my belief –

Q (Interposing) Okay. Thank you.

A - that he might have had some involvement so –

Q (Interposing) Making it –

A - I wouldn't say - I think the choice of words of saying that I had no information is incorrect.

Q No, you had no incriminating information although it was certainly information that led you to be even more sure that he was a suspect.

A It was building. It was good information from an investigative standpoint.

Q He did not admit to any criminal wrong-doing at that point?

A No, ma'am, he had not.

Q And it was at that point then that I think you said that Mr. Lyons began talking to him about how important it was to start telling the truth and to come clean, and that was between him and Mr. B[OMITTED], is that right?

A That's true. That was right after I had mentioned the camera that was taken, the one that he actually was seen looking into. After that, when the camera was shown, after that, is when Mr. Lyons said –

Q (Interposing) Okay. So he was confronted with some incriminating evidence, the camera that had been found and [28] identified as being with him?

A Right.

Q And I think you also told him about Ms. Hemmer having said that she had seen him in the area behind her home?

A Right.

Q And so he's confronted with those two things and still he continued to say that he hadn't gone into those particular homes?

A No, he actually - the next thing he said was quote, unquote, if I got the stuff back, was he still gonna be in trouble.

Q Okay.

A And then that's when I explained that this thing was gonna go to court.

Q That was after, though, Mr. Lyons had said –

A (Interposing) Yes.

Q - had started telling him that he needed to come clean.

A Right, right, right.

Q So after that, and the further information from you, that was when you then indicated to him that this thing is going to court and what's done is done.

A Um hmm (affirmatively).

Q And by that I assume you meant that basically you had, a case at this point?

A Right. What's been - what's done is done is what I [29] said. And that's pretty explanatory, I think.

Q Self-explanatory. And at that point you also told him that if he was gonna continue breaking into houses you were gonna have to get a secure detention order, is that right?

A Yes.

Q And he seemed a little concerned and he, in fact, asked you, what does that mean?

A Um hmm (affirmatively).

Q And you explained that what it means is that he could be held in custody, in detention until the court date.

A That is correct.

Q And it was at that point that you then decided to tell him that he didn't have to talk to you and that he wasn't under arrest, and that was then followed by his statement implicating himself.

A Right. I reiterated that he didn't have to talk to me, he was not under arrest, that I hoped that he would listen to what I had to say about it.

Q And of course that followed though the fact that what's done is done, this case is going to court.

A Um hmm (affirmatively).

Q And explaining what secure detention was, right?

A Yes.

Q Now after he gave a full statement you then told him he could go home on the bus.

[30] A That is correct.

Q And at that point, after you had gotten a statement, did you make any attempts to call a parent or guardian?

A We went by the residence and no one was home.

Q Did you make any attempts to call a parent or a guardian?

A What I told J[OMITTED] is, get on the bus, I'm gonna go meet with your grandmother and aunt in a little while, and we'll talk about it then.

Q Did you make any attempts to call –

A (Interposing) No, ma'am; I didn't have time. I went back to the Police Department, got my search warrant signed, and came back up.

Q And so you went to the Police Department and got a search warrant - or were in the process of getting a search warrant, there was another - you went and spoke to a supervisor who said, well, you'd better go and secure that, or send an officer there to secure the home while you're still getting the search warrant, right?

A I wouldn't say secure the home. I would say, you just let someone go who could potentially go back to the residence and destroy evidence. You need to go back there and see if you can make contact with the parent. And I said, okay, that's a good idea. And I asked Investigator Hunter if he would please go up there and just wait, make [31] contact with the family if someone's home, explain we're going to get a search warrant, and wait there with them when J[OMITTED] got there. And when I drove Investigator Hunter up there, there were no vehicles in the driveway. J[OMITTED] was just let off the bus and was walking up the road. And we knocked, no one answered, and I said, you know, if they come home, explain to them where I'm going and J[OMITTED] said, come on in, I'll get the stuff. And I said, that's not the way it works.

Q Now before you arrived back there then, you said Officer Hunter was sent to the home and he –

A (Interposing) No, I drove him to the home.

Q You drove Officer Hunter there?

A Yes.

Q And left him there when J[OMITTED] got off the bus.

A That's right.

Q Now you were concerned about getting a search warrant because you had heard that there might be difficulty in cooperation. You mentioned something about the fact that you thought you needed to get a search warrant because you were worried about lack of cooperation from the family and some concerns that maybe this earlier detention, they were upset that maybe it had been racially motivated.

A There are two ways to get - if you think evidence is located in a residence, there are two ways to go about it; [32] getting consent or getting a search warrant. And because J[OMITTED] can't give consent, my options were to get consent from the family to look around their home or to get a search warrant and I opted with the safety of getting a search warrant.

Q But in the meantime, you had an officer there with Mr. B[OMITTED] when he arrived home. And in fact, that officer was let into the home by Mr. B[OMITTED], wasn't he?

A J[OMITTED] opened the door and said, come on in.

Q Right.

A We stepped into the kitchen and then said, we can't - he was going back to his bedroom and I said, J[OMITTED], we can't go back there, we can't get consent from you to do this, says "anybody home?" Nobody answered, okay, we're going back out. And I said, we're onna wait outside, will you wait outside with us. And he said, yup, and that's when J[OMITTED], of his own free will gave the ring out of his pocket to Investigator Hunter after I had left to go back to the Police Department to get the search warrant signed.

Q So after you left, were you aware that Officer Hunter then went - there was a time when Officer Hunter went back into the home with J[OMITTED] while you were gone?

A I'm not aware of that.

Q Then when you came back, you had the search warrant signed?

[33] A Yes.

Q At that point you went into the home with J[OMITTED] and he cooperated and he found at least one or two additional items?

A That is correct.

Q And then at this point, still no parent had come home, no parent or guardian?

A No.

Q And at no point did you or Officer Hunter or your supervisor who seemed concerned about contacting a guardian, none of you contacted - attempted to make a phone call to a parent or guardian?

A I'm going to look at the phone numbers that I have, but I don't believe I have any cell phones.

Q Well, my question is, did anybody make an attempt to make a call?

A Being that we were at the residence and I don't believe we had a cell phone number - I'm just gonna look and see. I don't have any cell phone numbers listed.

Q Was there any attempt to ask the school or - you said you had information both from Officer Ennis and the school that had names, possibly some contact information, was there any attempt made to locate them in any way?

A Yes.

Q What was that?

[34] A To go by the residence and to speak with them.

Q Okay. But they were not –

A (Interposing) Right after being at the school.

Q - at the residence. Was there any attempt made to contact them by phone or to go by a place of work or business?

A Not at that time.

Q And so after the search is done inside the home, then you talked to J[OMITTED] outside and he then indicates that - or I think you asked him about the rest of the items and where they might be and the importance of trying to recover these additional items.

A Right.

Q And he volunteers that there might be something over at the BP station?

A That is correct.

Q So do you actually walk or drive over to the BP station?

A We walked.

Q You walked to the BP station?

A Um hmm (affirmatively), just around the corner.

Q Is that you and Officer Hunter with him?

A Yes.

Q And he then gives something from there?

A He points out to the shed and I climbed up there, saw [35] that the chain was up there and retrieved it.

Q Then you returned back to the home, or outside the home?

A We went by the Ms. Hemmer's residence on the way back which is two houses before on the left-hand side before you get to J[OMITTED]'s house, and I said, well, this is her house, can you just show us how, you know, where you walked and where you went around, maybe we can find some more of the jewelry. And we actually looked in the flower bed because when he ran around back he said, you know, he put it in his pocket, but I said, is it possible that some of it could've fallen out. He said, it's possible, so we went back there and looked. Looked all in the front, looked in the ditch, couldn't find anything.

Q And then at that point I think you started talking about, you know, - or he indicated that [OMITTED] still had the cell phone?

A Right.

Q You had that information.

A And there were some garnet earrings that were of value that I mentioned to J[OMITTED]. When I asked him about the earrings, his eyes didn't really register that he knew what I was talking about so I thought well, it's possible that these earrings actually are with

[OMITTED], so I said, the garnet earrings and the cell phone, you know, any other [36] jewelry - because not all the jewelry was recovered - I said we need to get that back. I think that would be really helpful.

Q You told him it would be important to the case –

A (Interposing) And he said –

Q - if he got those back.

A And J[OMITTED] said, if you go talk to [OMITTED], you know, he's probably not gonna give it to you. He said, if I talk to him, he'll probably give it to me.

Q So at that point you volunteered to drive him –

A Um hmm (affirmatively).

Q - over to where [OMITTED] lives?

A That is correct.

Q So at that point, prior to putting - was that in a police car, I assume?

A It was in my Chevy Lumina, unmarked, green.

Q Unmarked police car. Okay. Before deciding to take him in the car where he had agreed to speak to [OMITTED], did you make an attempt to call a parent or a guardian?

A No, I left my business card with my phone number and I left a little note or had J[OMITTED] write a note, I believe is what I did, you know, explaining he was leaving with us and going to [OMITTED]'s and would be right back.

Q We have your son with us and will return him?

A Not exactly.

[37] Q Basically was the gist of the information.

A It was in his writing. You'll have to ask him what he wrote.

Q So you never actually left a note at all for the parents at the house?

A I left my business card with the note that he wrote.

Q Just J[OMITTED]'s note?

A Right.

Q Saying, I'm with the officers.

A Right.

Q And there was nothing additional retrieved from –

A (Interposing) No one came to the door at [OMITTED]'s.

Q There was no one home at [OMITTED]'s. Okay. Just one quick question back to when the statement was taken, this was a closed conference room; I assume the door was closed to the conference room?

A Um hmm (affirmatively).

Q If you could just answer for the record?

A Yes, it was a closed conference room.

MS. FENHAGEN: I have nothing further. Thank you.

COURT: Thank you, sir. You can step down. Other showing for the State?

MS. PEREZ: Your Honor, I do have Mr. Lyons who could testify about how he was brought to the room.

[38] COURT: Well, I don't think the standard applies for a private person. I think the only question before me is, is he in Mr. DiCostanzo's custody. So unless you have anything to add for purposes of the law enforcement interrogation, is there anything else?

MS. PEREZ: No, Your Honor.

COURT: Okay. Anything in defense of your motion, Ms. Fenhagen?

MS. FENHAGEN: Your Honor, I would actually want to call Mr. Lyons just for the purpose of the status of special education, but I may ask the state if they'd be

willing to stipulate to that or if they need to have him called.

COURT: Well, you know, Flow really doesn't—Flow addresses that and it really says it's not a factor. So ... I know that we've got a Supreme Court case but that has to do with - there's really more of a threshold question about whether he's in custody or not.

MS. FENHAGEN: Well, Judge, but I'm also gonna make an argument that I believe - I mean, I'm gonna provide case law to the Court about the equivalent of custody –

COURT: (Interposing) I'm familiar with the case law.

MS. FENHAGEN: But the additional argument [39] that I wanted to make, though, was as to the admissibility given the voluntariness of this statement and the knowing and intelligent aspect, the fact that he's special ed. would certainly be –

COURT: (Interposing) It only applies - you've gotta have custody. If you don't have custody, all that evaporates.

MS. FENHAGEN: Judge, well, I would argue that - well, I'm gonna be making a two-pronged argument. I'll make that at the appropriate time.

COURT: Do you wish to call any other witnesses before you make your argument?

MS. FENHAGEN: I do, Your Honor. I'd call Mr. B[OMITTED].

Appendix I

J[OMITTED] D[OMITTED] B[OMITTED],

having been first duly sworn, on oath, testified as follows on:

DIRECT EXAMINATION BY MS. FENHAGEN:

Q Mr. B[OMITTED], how old were you on September 26th?

A Thirteen.

Q Are you currently in school?

A Yes.

Q Where were you a student in September?

A (Unintelligible.)

Q What school did you go to in September?

[40] A Oh, Smith Middle School.

Q And what grade were you in or are you in?

A Seventh.

Q Now are you in the special education program there?

A Yes.

Q Now do you recall the officer who just testified, Investigator DiCostanzo, coming to your school in September?

A Yes.

Q And where were you when you first were notified that he was there?

A In Social Studies, my last class of the day.

Q And what happened?

A Officer Gurley came and got me from class and told me that there was an officer that wanted to talk to me.

Q And what happened after he got you out of class?

A We walked down to the conference room.

Q What happened when you got to the conference room?

A He introduced hisself (sic) and I introduced myself. And then he started asking me what do I like and stuff like that and then he asked me what happened that day when [OMITTED] came over.

Q When [OMITTED] had come over?

A Um hmm (affirmatively).

Q What did you tell him?

A And I had told him the day that [OMITTED] had came over me [41] and him didn't have nothin' to do, so we had went down and was askin' people could we cut their grass and we had went to Paula (sic) house first and she wasn't there. So we went to another house and this boy said that his mom wasn't there and to come back later. And then we went to one more house. And the week before that I had send out some letters about anybody need help walkin' their dogs.

Q After you told him all of that, did he say anything more to you?

A After I told him all that, he started askin' me questions like –

Q (Interposing) Did - go ahead, sorry. Go ahead.

A He started asking me questions about - he started asking me questions about, um, about did we go around the back of anybody houses and have we called them or did we just go to their houses without calling 'em and I told him yes, we had went to their houses without calling and we did not go around the backs of anybody house.

Q At that point did you admit that you'd been in anybody's - inside any of these houses?

A No.

Q After that, did he show you the camera?

A After that, he told Officer Gurley to hold up the camera. And then he had showed me the camera.

Q Now where were you sitting in the room, do you recall?

[42] A Like, the desk was - say that was the desk, I was sittin' right there, he was sittin' right there, Officer Gurley was sittin' in the back of the room, Mr. Lyon and Mr. Dixon was sittin' on that side.

Q Was the door closed?

A Yes.

Q Now after you kept saying what you had been doing there, going around and offering work and knocking on doors, what did - if you remember, what did Investigator DiCostanzo tell you then?

A Can you say that one more time?

Q After you said what you've just said, did somebody else say something, either Officer –

A (Interposing) Mr. Lyons said - Mr. Lyons said, J[OMITTED], tell the truth; we've been through this a lot of times.

Q Okay. And then did Investigator DiCostanzo say anything?

A And - I don't remember if he said anything or not, but I think he didn't.

Q At some point did you try to leave?

A Well, he - after - after Mr. Lyons had said that, he had asked me some more questions and then after I answered them questions he was like, you free to leave at any time, and then I was - he was like, you free to leave any time and [43] he was like, well, I just want you - he was saying something like, I just – I just wanna get through this without – he was telling me something about he just wanna get through this without having any problems.

Q Well, now when he told you you were free to leave, did you try to leave?

A I was - I was movin' - I was movin' like this and then he asked me another question and he had - he had asked me some more questions and I was answering his questions and then he was like, well, we already - well, we already have enough to arrest you. And I was like, and I didn't say nothin' and then he was - he was like, well, this thing is goin' to court. And I was like, okay.

Q What did you think he meant by saying this thing is going to court?

A That he's goin' take me to court.

Q And did he make any movements with his hands or with his body when you thought - when you said you started to get up to leave?

A No.

Q And was it at that point that you were thinking about leaving that he then started telling you about this is done, this is going to court?

A I don't remember if it was before or after.

Q Okay. That's okay. Now at some point did he talk to [44] you about - do you remember him talking to you about secure detention?

A No.

Q Do you remember him saying anything about custody or putting you in –

A (Interposing) I remember him saying that if I don't cooperate, he could put me in custody till it's time to go to court.

Q Did you believe him?

A Yeah.

Q Was it after that that you then admitted being in the home - homes?

A Yes.

Q When you first started talking to him, did he ever tell you that you had a right to have an attorney present

and that anything you say could be used against you? At any point when you were talking to him in the conference room, did he say that?

A I think he did, but I'm not sure.

Q You don't remember?

A No.

Q Did he ever tell you that you could call a parent or a guardian?

A No.

Q Did you - okay. There was never a parent or guardian [45] present at any time, was there, during this?

A No.

Q Now it was after you then - were you scared during this time?

A Yes.

Q It was after you then said that you had been in the homes that you then later that afternoon started giving some items back?

A Yes.

Q So what happened - when you got home from the school bus, was there an officer there?

A Well, when he had dismissed me to go to school I had got on my school bus and then the school bus had dropped me off and he had pulled right behind me and he had said, if I knew I was goin' be this close behind you I could've gave you a lift. So then when we got to the house - when we got to the house I say, you can come in. He was sittin' out - I said, you can come in and he came into the kitchen, him and this other police officer. And this other police officer had came into the kitchen. And I had went –

Q (Interposing) Well, how did they - did they ask if they could come in the house?

A Did - no, they didn't. I just said, you could come in 'cause that's how I normally - when people - I don't like 'em waitin' outside, I say you could come in.

[46] Q So you let them in the house?

A And then they stepped into the kitchen. And then I had went around the house to see if was anybody there and nobody was home, so I came back up front and I was like, well, you can search it if you want because - okay, and then I said my room is down here, and then we started walkin' to my room. And then I had looked up on top of the stereo and I got some jewelry and I had gave it to 'em, and then they's like, can you remember any other place where you have put jewelry.

And I was like, not - not right now. And then -

Q (Interposing) Why were you giving them pieces of jewelry?

A Because at school I told him I will cooperate.

Q And did they tell you anything that might happen if you didn't give that stuff?

A No, they just said it would make the case better. And, um, and before that they had told me, if you don't cooperate, then you could become in custody.

Q Now did they ask you to sign some paper when you were there?

A Yes, and then after I gave 'em some jewelry, they asked me sign the paper, and he read it - he read it to me, then I signed it, and then he - they went back outside and two officers stay with me while he went and got the paper signed.

[47] Q Do you know what you signed?

A No.

Q Now did they say anything about what they might have to do to your house if you didn't give -

A (Interposing) Oh, yeah, they said when - they was like, if you can't remember anything else, we probably gonna have to tear it down.

Q Did they ever ask to call your grandmother -

A (Interposing) No.

Q - while you were in the house with them?

A No.

Q Now at some point did you agree to go with them in the police car?

A Yes.

Q And where did they take you in the police car?

A Well, we had walked down to Paula's house and he had asked me show him how we went in and where the gloves and stuff, and I had showed him all that, and then we went back up to the house, and I was like, - well, on the way walkin' back up to the house, we was talkin' about can you remember anywhere else. I said might be some on the BP, so he came up there and we got in his car and drove down to the BP.

Q And then after that did you - you got in the car and drove to [OMITTED]'s house?

A And then he jumped up on that roof and got the jewelry [48] and then we looked out in the field 'cause I had remembered I had threw some jewelry in the gutter and he found some. And then we had went to [OMITTED]'s house.

Q And that was also in the car?

A Yes.

MS. FENHAGEN: Okay. I have nothing further.

COURT: Ms. Perez?

MS. PEREZ: Just briefly.

CROSS EXAMINATION BY MS. PEREZ:

Q J[OMITTED], what does it mean to be arrested?

A What does it mean to be arrested? I don't know what it - I don't know what it means. I just know they put you in handcuffs and put you in the jail.

Q And do you know what it means to cooperate?

A Yes.

Q What does that mean?

A That means to like do what you told and not give 'em any problems.

Q And do you remember Investigator DiCostanzo mentioning anything about if you broke into any other houses?

A Yes.

Q What would happen if you broke into other houses?

A Yes.

Q What did he say?

A He said, can I trust that you won't break into any [49] other houses.

Q Um hmm.

A And he was like, can you promise me you won't break in any other houses or I'll put you on the custody. Yeah, he told me that.

Q He said if you broke into other houses, you'd be placed in custody?

A Um hmm (affirmatively).

Q And did Mr. Lyons talk to you while you were in the room?

A He just said that one thing, J[OMITTED] - he said, J[OMITTED], we all been through this enough, just tell the truth, and that's all he told me - said to me.

MS. PEREZ: I don't have any other questions.

COURT: Thank you. You can step down. Other witnesses for the defendant?

MS. FENHAGEN: No, Your Honor.

COURT: Okay. The Court's going to rule that there is no custody for purposes of this interrogation. And *State v. Flow* rules on the mental capacity and I think he clearly has the capacity to understand those concepts. So your Motion to Suppress is denied. Okay? When are we gonna try this case?

MS. PEREZ: Your Honor, the State's witnesses have requested to go to January 24th.

[50] COURT: Okay. January 24th. We'll see you there for adjudication. Make sure I'm not the judge on that one, Ms. Perez and Ms. Fenhagen. Judge DeVine is scheduled that day. Good luck, J[OMITTED]. I hope things work out.

MS. PEREZ: Thank you.

MS. FENHAGEN: Thank you, Your Honor.

UPON WHICH THE MATTER CONCLUDED

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PETITIONER'S BRIEF

2

No. 09-11121

Supreme Court, U.S.
FILED
DEC 16 2010
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IN THE

Supreme Court of the United States

J. D. B.,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a trial court may consider a juvenile's age in a Fifth Amendment *Miranda* custody analysis in evaluating the totality of the objective circumstances and determining whether a reasonable person in the juvenile's position would have felt he or she was free to terminate police questioning and leave?

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BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the North Carolina Supreme Court is officially reported at 363 N.C. 664, 686 S.E.2d 135 (2009), and is reproduced in the Joint Appendix. (J.A. 6a-47a)

JURISDICTION

The judgment of the Supreme Court of North Carolina affirming J.D.B.'s adjudication of delinquency and disposition was entered, pursuant to N.C.R. App. P. 32(b), on 31 December 2009. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part: "No person...shall be compelled in any criminal case to be a witness against himself...."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No state shall...deprive any person of life, liberty, or property, without due process of law...."

STATEMENT OF THE CASE

On Saturday, 24 September 2005, two homes in Chapel Hill, North Carolina were broken into. A digital camera, cell phone, jewelry, and other items were taken.

(J.A. 97a, 106a, 112a-113a, 122a) On the day of the break-ins, Chapel Hill Police Officer Ennis stopped and questioned two boys he saw looking into a house. One of the boys, J.D.B., gave Officer Ennis his correct last name and an incorrect first name. Ennis talked to J.D.B's grandmother and aunt, who seemed hostile and resistant and accused Ennis of stopping J.D.B. for racially motivated reasons. (J.A. 107a, 117a, 125a)

On Monday, 26 September 2005, Juvenile Investigator DiCostanzo of the Chapel Hill Police Department was assigned to the case. (J.A. 106a) He spoke to Paula Hemmer, whose house had been broken into. Ms. Hemmer told him that J.D.B. cut her grass in the past, but that she had told J.D.B. that she could not use him for the rest of the year because she had lost her job. (J.A. 107a, 111a) At DiCostanzo's request, Officer Ennis looked through the Smith Middle School yearbook to identify the boys he had stopped. Officer Ennis identified J.D.B., a thirteen-year-old special education student who attended the seventh grade at Smith Middle School. (J.A. 97a-98a, 107a, 124a, 143a)

On Thursday, 29 September 2005, Officer Gurley, a uniformed police officer assigned to Smith Middle School, called Investigator DiCostanzo and told him that a parent had brought a digital camera to school that possibly matched the camera taken in the break-in. (J.A. 107a-108a, 127a) Investigator DiCostanzo went to the middle school, verified J.D.B.'s date of birth, and asked Gurley to double check the address, telephone number, and name of J.D.B.'s legal guardian, his grandmother. (J.A. 124a-126a) Investigator DiCostanzo interviewed two students about the camera and to obtain background

information. (J.A. 110a, 123a) He then met with Officer Gurley, Assistant Principal Lyons, and Lyons' administrative intern Mr. Benson, advised them that he had information implicating J.D.B. in the off-campus break-ins, and discussed questioning J.D.B. (J.A. 108a-109a, 124a) The four decided to interrogate J.D.B. together. DiCostanzo encouraged Assistant Principal Lyons to ask J.D.B. anything he wanted to. (J.A. 116a) Investigator DiCostanzo did not call J.D.B.'s grandmother, his legal guardian, to tell her that J.D.B. would be questioned. (J.A. 98a, 124a, 126a, 132a)

Officer Gurley removed J.D.B. from his social studies class, told J.D.B. that a police officer wanted to talk to him, and escorted J.D.B. to a conference room where DiCostanzo, Lyons, and Benson were waiting. (J.A. 98a, 109a, 126a, 144a) The door to the conference room was then closed. (J.A. 98a, 141a)

Investigator DiCostanzo told J.D.B. that he was a juvenile investigator from the Chapel Hill Police Department. (J.A. 127a) He talked to J.D.B. about being the oldest child in his family and said "it must be hard to be the little man." J.D.B. said that it was. DiCostanzo asked J.D.B. about sports and the two talked about football. DiCostanzo continued making small talk. (J.A. 114a, 127a)

DiCostanzo then told J.D.B. that he wanted to follow up on J.D.B.'s encounter with police officers the previous weekend and asked if J.D.B. would talk about it. (J.A. 110a) Investigator DiCostanzo did not tell J.D.B. that he did not have to talk or that he was free to leave. (J.A. 98a, 112a) J.D.B. responded that "it really wasn't a big

deal," as he had been going around asking if anyone needed their yard mowed, was stopped by police, and then went home. (J.A. 98a, 110a)

Investigator DiCostanzo asked for more details, such as which house J.D.B. went to first. J.D.B. said that he and a boy named Jacob went first to Paula Hemmer's house, who was a regular customer. Ms. Hemmer was not at home. They went to a "bunch" of other houses as well, but did not go inside. He also said that he had previously put out slips offering to walk dogs. (J.A. 110a-111a, 127a, 145a) The information J.D.B. provided supported DiCostanzo's belief that J.D.B. had some involvement in the break-ins. (J.A. 128a-129a)

DiCostanzo asked J.D.B. to tell him about the time Ms. Hemmer caught him and his brother in her backyard. J.D.B. said that he was only cutting through and that he had asked Ms. Hemmer on that day also whether he could cut her grass. Investigator DiCostanzo informed J.D.B. that Ms. Hemmer told DiCostanzo that she had previously told J.D.B. that she was not going to have him cut her grass anymore because she had lost her job. J.D.B. made no response. DiCostanzo then told J.D.B. that he had the camera that was stolen from one of the houses. (J.A. 111a) J.D.B. again said nothing. (J.A. 112a) DiCostanzo asked Officer Gurley to show J.D.B. the camera and Gurley held the camera up. (J.A. 116a, 146a) It appeared to DiCostanzo that J.D.B. did not know what to say when he was confronted with the camera. (J.A. 112a)

Vice-Principal Lyons told J.D.B. that the two of them had had long conversations in the past and he really

wanted J.D.B. to "do the right thing." Lyons told him that the truth "always comes out in the end." (J.A. 112a) J.D.B. asked "if he got the stuff back was he still gonna be in trouble." DiCostanzo told him that it would help to get the items back, but that "this thing is going to court. What's done is done, [J.D.B.], now you need to help yourself by making it right." DiCostanzo added that given what J.D.B. had already said, he would have to look into getting a secure custody order if he felt that J.D.B. was going to continue breaking into people's houses. J.D.B. asked what that was. DiCostanzo told him that it was when you get sent to juvenile detention before going to court. (J.A. 98a-99a, 112a, 129a-131a, 146a, 148a)

Investigator DiCostanzo then told J.D.B. that he did not have to speak with him and that J.D.B. could get up and leave, but that he hoped that J.D.B. would listen to what DiCostanzo had to say. (J.A. 131a, 147a) J.D.B. started talking rapidly and told DiCostanzo that he had taken a camera and Jacob had taken a cell phone. He said that the breaks-ins were Jacob's idea. DiCostanzo asked about the other house that was broken into. J.D.B. said that Jacob had all of the jewelry. DiCostanzo asked J.D.B. to tell him how they got into the houses. J.D.B. then admitted that he put the jewelry into his pocket. (J.A. 112a-113a) Investigator DiCostanzo asked why they had left more valuable items such as a laptop computer. J.D.B. told him that this was the first time he had broken into a house and he had not known what to take. (J.A. 113a)

Investigator DiCostanzo told J.D.B. that although he had been taking notes, he wanted to be sure he

understood what J.D.B. had said and asked if J.D.B. would write it down. (J.A. 113a) J.D.B. wrote: "Sunday me and Jacob went to Paula's house and stole cell phone and camera and he stole some jewelry. The jewelry was taken out of Paula's house and we went back home and put it in the book bag." After signing this statement, J.D.B. wrote, "I'm gonna get Jacob to give the jewelry back." (J.A. 99a, 113a-114a)

The final school bell rang. Investigator DiCostanzo asked J.D.B. how he usually got home. J.D.B. said that he usually rode the bus. DiCostanzo asked J.D.B. to look him in the eye and promise he would not do this again. J.D.B. promised. DiCostanzo told J.D.B. to leave before he missed the bus and that he would see him at his house in a little while. DiCostanzo let J.D.B. leave the room. (J.A. 114a, 117a, 132a, 150a, 154a) The interrogation had lasted thirty to forty-five minutes. (J.A. 100a, 116a)

Investigator DiCostanzo stayed at the school to finish drafting a search warrant for J.D.B.'s home. Due to the hostility displayed by J.D.B.'s family the previous weekend, DiCostanzo did not know whether the family would consent to a search. (J.A. 117a) After completing the paperwork, DiCostanzo went to the Chapel Hill Police Department. DiCostanzo's supervisor expressed surprise that DiCostanzo had let J.D.B. leave school and wondered what would happen if J.D.B. went home and destroyed the evidence. He said that a police officer needed to be dropped off at the house while the search warrant was obtained. (J.A. 117a-118a, 133a) DiCostanzo drove Investigator Hunter to J.D.B.'s house. No one was at home. The school bus soon arrived and J.D.B. got off the bus. J.D.B. told the officers they could look around the house and he would show them where the

jewelry was. DiCostanzo told J.D.B. that he either needed a warrant or consent to search the house and that J.D.B. could not give consent to search. DiCostanzo left J.D.B. and Hunter standing outside the house while he got the search warrant signed by a magistrate. (J.A. 100a, 118a, 133a, 135a)

Investigator DiCostanzo returned to J.D.B.'s house with the warrant. No adult family member had yet arrived. (J.A. 136a) While standing outside, J.D.B. gave Hunter a ring of Ms. Hemmer's. The three went inside and J.D.B. retrieved more jewelry. (J.A. 118a, 135a) They then walked to a nearby gas station where J.D.B. had thrown some jewelry onto a shed. (J.A. 100a) As they walked back, Investigator DiCostanzo asked J.D.B. if he would mind showing him how J.D.B. had gotten to the back of Ms. Hemmer's house. J.D.B. complied. (J.A. 119a, 138a, 152a) Investigator DiCostanzo told J.D.B. that it would be very helpful if they could get whatever items Jacob had. J.D.B. said that he did not think Jacob would turn the items over to DiCostanzo, but Jacob would probably give them to him. They drove to Jacob's apartment, but no one was home. (J.A. 120a, 139a-140a)

On 19 October 2005, two juvenile petitions were filed against J.D.B. in Orange County District Court. Each petition alleged juvenile delinquency by one count of breaking and entering and one count of larceny. (J.A. 6a) On 1 December 2005, J.D.B.'s counsel filed a motion to suppress statements and evidence. (J.A. 88a-94a) After hearing testimony from Investigator DiCostanzo and J.D.B., the trial court denied the motion on the basis that J.D.B. was not in custody when he was interrogated at school. (J.A. 95a) On 24 January 2006, J.D.B. admitted the allegations in the petitions and renewed his objection

to the denial of his motion to suppress. The trial court entered an order adjudicating J.D.B. a delinquent and placing J.D.B. on probation. (J.A. 7a)

J.D.B. appealed the denial of his motion to suppress to the North Carolina Court of Appeals. The Court of Appeals remanded the case to the trial court for entry of findings of fact supporting its determination that J.D.B. was not in custody when he was interrogated. *In re J.B.*, 183 N.C. App. 299, 644 S.E.2d 270 (Ct. App. 2007) (unpublished). (J.A. 74a-87a) The trial court entered written findings on 16 October 2007, *nunc pro tunc* to 13 December 2005. (J.A. 97a-102a) On further review, a divided panel of the Court of Appeals affirmed the trial court. *In re J.D.B.*, 196 N.C. App. 234, 674 S.E.2d 795 (Ct. App. 2009). (J.A. 48a-73a) On 11 December 2009, in a 4-3 decision, the North Carolina Supreme Court affirmed the trial court's denial of the motion to suppress. *In re J.D.B.*, 363 N.C. 664, 686 S.E.2d 135 (2009). (J.A. 6a-47a) Judgment entered on 31 December 2009. (J.A. 4a-5a) On 1 November 2010, this Court granted J.D.B.'s petition for writ of certiorari to review the decision of the North Carolina Supreme Court.

SUMMARY OF THE ARGUMENT

In determining if a suspect was in custody when interrogated, such that *Miranda* warnings were required, a court must examine all of the circumstances surrounding the interrogation. "Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve 'the ultimate inquiry': '[was] there a "formal arrest or restraint on freedom of movement" of the degree

associated with a formal arrest.'" *Thompson v. Keohane*, 516 U.S. 99, 112 (1995) (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam)).

This Court has never excluded any objective circumstance from the custody analysis. As age is an objective circumstance, a court should weigh a juvenile's age in determining if custodial interrogation occurred. A child's age is readily observable and renders a child particularly susceptible to the coercive techniques of police interrogation. Absent consideration of age, a reliable custodial determination cannot be made. The line becomes blurred "between voluntary and involuntary statements," *Dickerson v. United States*, 530 U.S. 428, 435 (2000), and "no statement obtained from [a juvenile could] truly be the product of his free choice." *Miranda v. Arizona*, 384 U.S. 436, 458 (1966).

ARGUMENT

A TRIAL COURT MAY CONSIDER A JUVENILE'S AGE IN A FIFTH AMENDMENT *MIRANDA* CUSTODY ANALYSIS IN EVALUATING THE TOTALITY OF THE OBJECTIVE CIRCUMSTANCES AND DETERMINING WHETHER A REASONABLE PERSON IN THE JUVENILE'S POSITION WOULD HAVE FELT HE OR SHE WAS FREE TO TERMINATE POLICE QUESTIONING AND LEAVE.

Investigator DiCostanzo, fully aware that J.D.B. was only thirteen years old, made a series of calculated decisions about how to interrogate him. Having been notified by a police officer at J.D.B.'s middle school that

a camera possibly connected to the off-campus break-ins had been brought to school. Investigator DiCostanzo went to Smith Middle School. DiCostanzo decided to:

- conduct the investigation inside the school, rather than interview potential witnesses and J.D.B. at their homes, at the police station, on the schoolhouse steps, or at any other potential location;

- conduct the interrogation of J.D.B. in the presence and with the participation of uniformed Officer Gurley, Vice-Principal Lyons, and Lyons' administrative intern;

- send Officer Gurley to remove J.D.B. from class, rather than have J.D.B. brought to the interrogation by school personnel or otherwise summoned;

- conduct the interrogation in a conference room, a room which likely lacked the familiarity for a child of a classroom, gymnasium, lunch room, or other common area;

- conduct the interview behind a closed door;

- not initially advise J.D.B. why he was there;

- not initially advise J.D.B. that he was free to leave or free to decline to answer questions;

- begin the interrogation by building rapport;

- confront J.D.B. with Ms. Hemmer's statements contradicting the innocent explanation J.D.B. gave;

- ask Officer Gurley to display the stolen camera;

- permit Vice-Principal Lyons to urge J.D.B. to confess;

- advise J.D.B. that he had a case against him and the case would be going to court;

- threaten J.D.B. with detention at a juvenile facility;

- not advise J.D.B that he did not have to answer questions until after J.D.B. had incriminated himself; and

- tell him to take the school bus home where DiCostanzo would soon join him.

In assessing the totality of objective circumstances surrounding the interrogation, the North Carolina Supreme Court refused to consider that J.D.B. was only thirteen years old. Age is an objective factor, the consideration of which protects Fifth Amendment rights and furthers the prophylactic goals of *Miranda* with no undue burden being placed on the police or courts. The decision of the North Carolina Supreme Court was erroneous.

In *Miranda v. Arizona*, 384 U.S. 436, 439 (1966), this Court held as a constitutional matter that procedural safeguards were necessary to ensure that an individual subjected to custodial interrogation is "accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself." "An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion...cannot be otherwise than under compulsion to speak." *Id.* at 461. The Court required that custodial interrogation commence with an advisement of Fifth Amendment rights and ruled that absent such warnings, the prosecution could "not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444.

The *Miranda* custody test did not address age when it was announced, as in 1966 only adults were recognized as possessing Fifth Amendment rights.

In *In re Gault*, 387 U.S. 1 (1967), this Court extended Fifth Amendment privileges to juvenile delinquency proceedings, thereby ensuring that children too would not be "exploited for the information necessary to condemn them before the law." *Culombe v. Connecticut*, 367 U.S. 568, 581 (1961). The Court noted that it was "frequent practice that rules governing the arrest and interrogation of adults by the police are not observed in the case of juveniles." *Gault*, 387 U.S. at 14. Before a self-incriminating statement of a juvenile

could be admitted into evidence, the Court demanded clear and unequivocal "evidence that the admission was made with knowledge that he was not obligated to speak and would not be penalized for remaining silent." *Id.* at 44. Without specifically addressing the application of *Miranda* to juvenile interrogations, the Court nonetheless noted that one purpose of the Fifth Amendment, and consequently of prophylactic measures designed to effectuate the Amendment, was "to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction." *Id.* at 47.

This Court's Fifth Amendment discussion in *Gault* was deeply rooted in the Court's Fourteenth Amendment juvenile voluntariness jurisprudence, an arena where age had long been deemed a relevant subject of inquiry in a totality of the circumstances analysis. Prior to its recognition that the Fifth Amendment extended to juveniles, this Court had "emphasized that admissions and confessions of juveniles require special caution." *Id.* at 45. In *Haley v. Ohio*, 332 U.S. 596, 599-600 (1948), the Court observed that children were no "match for the police" in interrogation settings. Similarly, in *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962), the Court noted that a fourteen-year-old child is "not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and...unable to know how to protect his own interests or how to get the benefits of his constitutional rights." The Court recognized that a fourteen-year-old "cannot be compared with an adult

in full possession of his senses and knowledgeable of the consequences of his admissions." *Id.*

After *Gault*, this Court had no immediate opportunity to examine custody in a juvenile setting, as *Miranda* warnings were administered in *Fare v. Michael C.*, 442 U.S. 707 (1979), the sole juvenile case to reach the Court. It fell to state and lower federal courts, as well as state legislatures, to examine whether age had a place in the *Miranda* custody analysis. All jurisdictions that examined the issue concluded that it did, since courts were constitutionally bound to "examine all of the circumstances surrounding the interrogation[.]" *Stansbury v. California*, 511 U.S. 318, 322 (1994) (per curiam). *See, e.g., A.M. v. Butler*, 360 F.3d 787, 797 (7th Cir. 2004) (age of juvenile deemed "an important factor" in the totality of the circumstances evaluation); *United States v. Erving L.*, 147 F.3d 1240, 1248 (10th Cir. 1998) (evaluating whether a "reasonable juvenile" would have believed he was not at liberty to terminate interview and leave); *In re Jorge D.*, 202 Ariz. 277, 280-281, 43 P.2d 605, 608-609 (Ct. App. 2002) (objective test included "elements that bear upon a child's perceptions and vulnerability, including the child's age"); *People v. T.C.*, 898 P.2d 20, 25 (Colo. 1995) (applying a reasonable eleven-year-old test); *Ramirez v. State*, 739 So. 2d 568, 574 (Fla. 1999) (applying "reasonable juvenile" test); *In re Doe*, 130 Idaho 811, 818, 948 P.2d 166, 173 (Ct. App. 1997) (ruling that objective test for custody determinations must include a child's age); *People v. Braggs*, 209 Ill. 2d 492, 507, 810 N.E.2d 472, 482 (2004) (age is "analytically intertwined" with the reasonable-person prong of the custodial question); *State v. Smith*, 546 N.W.2d 916, 923 (Iowa

1996) (ruling that age is an appropriate consideration in the custody determination); *In re Joshua David C.*, 116 Md. App. 580, 594, 698 A.2d 1155, 1162 (Ct. Spec. App. 1997) (ruling that custody determination must consider a juvenile's age); *Commonwealth v. A Juvenile*, 402 Mass. 275, 277, 521 N.E.2d 1368, 1370 (1988) (custody test is how "a reasonable person in the juvenile's position would have understood his situation"); *Evans v. Montana Eleventh Judicial Dist. Court*, 298 Mont. 279, 284, 995 P.2d 455, 459 (2000) (examining whether "reasonable fourteen-year-old" would have felt free to leave); *In re Robert H.*, 599 N.Y.S.2d 621, 623, 194 A.D.2d 790, 791 (App. Div. 1993) (considering whether "reasonable 15-year-old" would have believed he was free to leave); *In re Loredo*, 125 Ore. App. 390, 394, 865 P.2d 1312, 1315 (Ct. App. 1993) (evaluating "whether a reasonable person in child's position" would have felt that he was in custody); *In re L.M.*, 993 S.W. 2d 276, 288-289 (Tex. App. 1999) (reasonable person standard includes consideration of age); *State v. D.R.*, 84 Wn. App. 832, 836, 930 P.2d 350, 353 (Ct. App. 1997) (applying reasonable fourteen-year-old standard).

State legislatures also recognized the need to ensure that juveniles were made aware of their Fifth Amendment rights and, due to their age, assisted in exercising them. This Court had stated in *Gallegos*, 370 U.S. at 54, that a fourteen-year-old

> would have no way of knowing what the consequences of his confession were without advice as to his rights – from someone concerned with securing him those rights – and without the aid of more mature judgment

> as to the steps he should take in the predicament in which he found himself. A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not. Adult advice would have put him on a less unequal footing with his interrogators. Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had.

Legislatures adopted procedures that (1) required that a parent, legal guardian, custodian, or attorney be present during the custodial interrogation of a child, Colo. Rev. Stat. §19-2-511 (2010); Conn. Gen. Stat. §46b-137 (2010); N.C. Gen. Stat. §7B-2101 (2010); W. Va. Code Ann. §49-5-2 (2010); (2) permitted a parent, guardian, or custodian to be present, Me. Rev. Stat. Ann. Tit. 15, §3203-A (2010); Mo. Rev. Stat. §211.059 (2010); (3) required that juveniles be advised of a right to communicate with a parent, legal guardian, custodian, or attorney, Ala. Code §12-15-202 (2010); (4) required parental consent to a custodial interrogation, N.Y. Fam. Ct. Act §305.2 (2010); or (5) required that a parent, guardian, custodian, or attorney concur in a child's decision to waive *Miranda* rights, Ind. Code §31-32-5-1 (2010); Kan. Stat. Ann. §38-2333 (2009); Mont. Code Ann. §41-5-331 (2010); Tex. Fam. Code Ann. §51.09 (2010); Wash. Rev. Code §13.40.140 (2010). Such statutes sought to address vulnerabilities of juveniles in custodial interrogations which were absent from custodial interrogation of adults. Other states required that a parent be notified that his or her child had been taken into custody, *e.g.*, Alaska Stat. §47.12.250(b) (2010); Fla.

Stat. §985.101 (2010); Ga. Code Ann. §15-11-47 (2010); 19 Guam Code Ann. Tit. 19 §5111 (2009); Haw. Rev. Stat. §571-31 (2010); Idaho Code §20-516 (2010); Ky. Rev. Stat. Ann. §610.200 (2010); Md. Code Ann. Cts. & Jud. Proc. §3-814 (2010); Mich. Comp. Laws §712A.14 (2010); Minn. Stat. §260B.176 (2009); Wis. Stat. §938.19 (2009), envisioning that parental notification would "permit, where possible, a parent to confer and counsel with the juvenile before interrogation and confession." *People v. Fuller*, 292 Ill. App. 3d 651, 665, 686 N.E.2d 6, 16 (Ct. App. 1997). *Accord Paxton v. State*, 159 Ga. App. 175, 178, 282 S.E.2d 912, 915 (Ct. App. 1981). Such protective measures were deemed necessary since minors' lack of capacity, which renders them unable to execute a binding contract, convey real property, marry, or purchase alcoholic beverages, compels against placing them "on the same footing as an adult when asked to waive important Fifth and Sixth Amendment rights at a time most critical to [them] and in an atmosphere most foreign and unfamiliar." *Lewis v. State*, 259 Ind. 431, 437-438, 288 N.E.2d 138, 141-142 (1972), *superseded by statute as stated in Sevion v. State*, 620 N.E.2d 736 (Ind. App. 1993). *Accord Roper v. Simmons*, 543 U.S. 551, 569 (2005) ("In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.").

While this Court had no opportunity to examine the relevancy of age, such was not true of interrogators, who have not ignored age in creating the coercive environment conducive to self-incrimination. Agreeing with this Court that "'[t]hat which would leave a man

cold and unimpressed can overawe and overwhelm a lad in his early teens,'" *Gault*, 387 U.S. at 45 (quoting *Haley*, 332 U.S. at 599), interrogators have been taught to not only use psychological techniques designed to elicit confessions from adult suspects, but also to utilize "theme developments and guidelines particularly applicable to" children. John Inbau, et al., *Criminal Interrogation and Confessions*, 298 (4th ed. 2004). In addition to the adult interrogation techniques of

> directly confronting the suspect about her guilt; developing 'techniques of neutralization' or psychological themes to justify or excuse the crime; interrupting the suspect's attempts at denial; rebuffing the suspect's explanations or assertions of innocence; engaging the suspect if she becomes passive or tunes out; showing sympathy and urging the suspect to tell the truth; offering a face-saving alternative, albeit incriminating, explanation for committing the crime; having the suspect orally relate some incriminating details of the crime; and finally, having the suspect provide a signed written confession.

Barry C. Feld, *Criminology: Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. Crim. L. & Criminology 219, 236-237 (2006) (summarizing the nine-step "Reid Method" of interrogation), experts suggested, as to children, that the interrogator "attempt to learn...whatever information is available regarding the suspect's background," as "[t]he investigator's awareness of such

facts can be of considerable assistance in the interrogation." Inbau, *supra*, at 298. The interrogator has been further taught to advise children of "the grave consequences...of a continuation of relatively minor criminal behavior." *Id.* at 300.

In shaping the contours of interrogation, police officers are aware, as scientific and sociological studies have confirmed, that "'[j]uveniles are not, after all, miniature adults.'" *In re J.D.B.*, 196 N.C. App. 234, 247, 674 S.E.2d 795, 804 (Ct. App. 2009) (Beasley, J., dissenting) (quoting *In re Stallings*, 318 N.C. 565, 576, 350 S.E.2d 327, 333 (1986) (Martin, J., dissenting)). Children are "more vulnerable or susceptible" to influence and pressure than adults, *Roper*, 543 U.S. at 569, as "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Graham v. Florida*, 176 L. Ed. 2d 825, 841 (2010). Since, as this Court has recognized, "the very fact of custodial interrogation...trades on the weaknesses of individuals[,]" *Miranda*, 384 U.S. at 455, weaknesses could not be more evident than in children, who possess "inferior mental capabilities [which] hamper them from understanding their situations and make them especially susceptible to police interrogation procedures." Tara L. Curtis, Recent Development: *Yarborough v. Alvarado: Self-Incrimination Clause Does Not Require Consideration of Age and Inexperience in the Miranda Custody Context*, 40 Harv. C.R.-C.L. L. Rev. 313, 324 (2005). Their "diminished competence relative to adults increases their susceptibility to interrogation techniques," as the "[s]ocial expectations of obedience to authority and children's lower social status make

them more vulnerable than adults during interrogation." Feld, *supra*, at 230, 244.

Studies have demonstrated that juveniles under the age of sixteen are significantly more likely to comply with adult authority in a legal setting and confess to police. Thomas Grisso, et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 Law & Hum. Behav. 333, 353 (2003). "[A]s a group, adolescents are more willing than adults to confess rather than remain silent when confronted by an authority figure such as the police – especially if they believe it will result in an immediate reward, such as going home." Laurence Steinberg, *Juveniles on Trial: MacArthur Foundation Study Calls Competency Into Question*, 18 Crim. Just. No. 3, 20, 23 (Fall 2003) (referring to the Grisso study, *supra*).

The same study documented that juveniles under the age of fourteen were less able than their older peers to recognize the future consequences of their legal decisions. Grisso, *supra*, at 354. Under conditions of emotional arousal, the psychosocial deficiencies of children "diminish the regulatory effectiveness of the cognitive-control network." Laurence Steinberg, *Risk Taking in Adolescence: New Perspectives from Brain and Behavioral Science*, 16 Current Directions Psychol. Sci. 55, 56 (2007).

With courts throughout the country turning to a "reasonable juvenile" standard to assess whether a "reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave," *Thompson v. Keohane*, 516 U.S. 99, 112 (1995), courts

were also adopting the identical objective standard used in other areas of criminal and civil law. *E.g.*, *United States v. Little*, 18 F.3d 1499, 1505 n.6 (10th Cir. 1994) (en banc) (age is objective factor in determining whether individual has been seized for Fourth Amendment purposes); *J.R. v. State*, 62 P.3d 114 (Alaska Ct. App. 2003) (age considered in determining whether child charged with murder displayed reckless disregard for life); *People v. Steckley*, 225 Ill. 2d 246, 870 N.E.2d 333 (2007) (age is objective circumstance considered in *Crawford v. Washington*, 541 U.S. 36 (2004), analysis of whether reasonable person in child's circumstance would have understood testimonial nature of statement); *State v. Clay*, 297 N.C. 555, 563, 256 S.E.2d 176, 182 (1979) (age is objective factor utilized in self-defense analysis), *overruled in part on other grounds*, *State v. McAvoy*, 331 N.C. 583, 601, 417 S.E.2d 489, 500 (1992); 57B Am. Jur. 2d *Negligence* §872 (2010) (age is factor in reasonably prudent person test under tort law); Restatement (Second) of Contracts, §14 (1981) (age is factor in contracts law); Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 St. John's L. Rev. 725 (2004) (age is relevant to duress and mistake defenses because "[a]lthough the reasonable person is an objective abstraction, he or she is not a wholly undifferentiated abstraction").

By including age in the custody analysis, courts also adopted an objective factor long utilized in assessing three of the remaining four prongs of a confession issue: whether an interrogation occurred, *Rhode Island v. Innis*, 446 U.S. 291, 302 n.8 (1980), whether the suspect waived his or her *Miranda* rights, *Fare*, 442 U.S. at 725,

and whether the statement was voluntary. *Haley*, 332 U.S. at 599-601. The interrogation test of *Innis*, in particular, was described as "an objective inquiry into the likely effect of police conduct on a typical individual, taking into account any special susceptibility of the suspect to certain kinds of pressure of which the police know or have reason to know." *Innis*, 446 U.S. at 305 (Marshall, J., dissenting). With law enforcement already attuned to considering age in those three areas of inquiry, no additional burden was deemed by these courts to exist in considering age on the custody question.

Judicial and legislative consideration of age in reasonable person inquiries does not subjectify an objective inquiry since the test neither seeks nor demands a determination of the juvenile's actual beliefs, but only how the hypothetical reasonable person in the juvenile's position would have understood his or her position. "Custody for *Miranda* purposes is a state of mind. When police create a situation in which a suspect reasonably does not believe that he is free to escape their clutches, he is in custody and...entitled to the *Miranda* warnings." *United States v. Slaight*, 620 F3d 816, 820 (7th Cir. 2010). The custody analysis focuses upon "the way in which suspects experience interrogation," *Missouri v. Seibert*, 542 U.S. 600, 624 (2004) (O'Connor, J., dissenting), with all objective circumstances assessed from the perspective of "how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action." *Stansbury*, 511 U.S. at 325. When police escort an individual to an interrogation, conduct the interrogation behind closed doors, outnumber the

suspect in the closed environment, fail to convey that the questioning will be brief, confront the suspect with incriminating evidence, urge the futility of protesting innocence, and threaten round-the-clock detention, *cf. Berkemer v. McCarty*, 468 U.S. 420 (1984); *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam), all such factors – present in the instant case – must be evaluated from the perspective of whether the reasonable person would deem his or her freedom of action was deprived "in any significant way." *Miranda*, 384 U.S. at 444. The cognitive differences between juveniles and adults, documented by MRI examinations, affect the manner in which the reasonable juvenile experiences such typically coercive interrogation techniques. Jennifer Park, Supreme Court Review: *Yarborough v. Alvarado: At the Crossroads of the 'Unreasonable Application' Provision of the Antiterrorism and Effective Death Penalty Act of 1996 and the Consideration of Juvenile Status in Custodial Determinations*, 95 J. Crim. L. & Criminology 871, 900 (2005).

The relevance of age to the custody inquiry finally reached the Court in *Yarborough v. Alvarado*, 541 U.S. 652 (2004), but not in a procedural posture allowing for *de novo* consideration of the question. The issue before the Court was not whether age bore on the custody determination, but whether "a state court unreasonably applied clearly established law when it held that the respondent was not in custody for *Miranda* purposes." *Id.* at 655. With age never having been previously discussed in this Court's *Miranda* jurisprudence, and age not even pressed by Alvarado's counsel "on direct appeal or in habeas proceedings," *id.* at 666, the majority

of the Court concluded "that the state court's application of our custody standard was reasonable." *Id.* at 665.

While five members of the Court noted that a suspect's prior experience with police had never been considered part of the objective inquiry, since prior experience is a fact which police were unlikely to be aware of and "the relationship between a suspect's past experiences and the likelihood a reasonable person with that experience would feel free to leave often will be speculative[,]" *id.* at 668, no consensus existed on the issue of age. Four members of the Court opined that age "could be viewed as creating a subjective inquiry[,]" *id.*, one opined that "[t]here may be cases in which a suspect's age will be relevant to the *Miranda* 'custody' inquiry," *id.* at 669 (O'Connor, J., concurring), and four justices opined that "youth is an objective circumstance.... It is not a special quality, but rather a widely shared characteristic that generates commonsense conclusions about behavior and perception." *Id.* at 674 (Breyer, J., dissenting).

With consideration of age not foreclosed by *Alvarado*, numerous state courts have continued to look at age in their custody determinations. *E.g. People v. Howard*, 92 P.3d 445 (Colo. 2004) (age one of many factors used in totality of circumstances analysis); *In the Matter of the Welfare of D.S.M.*, 710 N.W.2d 795 (Minn. Ct. App. 2006) ("the determination of whether a juvenile would reasonably believe he or she was in custody must be made from the perspective of the juvenile"); *In the Interest of C.H.*, 277 Neb. 565, 763 N.W.2d 708 (2009) (fourteen-year-old interrogated by sheriff's officer for

thirty minutes in unlocked conference room at school "would not believe he was at liberty to terminate the interrogation and leave"); *In re D.B.*, 2009 Ohio 6841, 2009 Ohio App. LEXIS 5735 (2009) (twelve-year-old would not believe he was free to leave stationhouse interview); *In re K.Q.M.*, 2005 Pa. Super. 148, 873 A.2d 752 (Super. Ct. 2005) (sixteen-year-old's age considered in custody determination); *In re M.G.*, 2010 Tex. App. LEXIS 6638 (Tex. Ct. App. 2010) (inquiry is whether "a reasonable child of the same age would believe his freedom of movement was significantly restricted"); *In the Interest of Dionicia M.*, __ N.W.2d __, 2010 Wisc. App. LEXIS 678 (Wis. Ct. App. 2010) (a reasonable person, particularly one fifteen-years-old, would not have felt free to leave). Commentators agreed that the inquiry is relevant. J.F. Ghent, Annotation, *What constitutes 'custodial interrogation' within rule of Miranda v. Arizona requiring that suspect be informed of his federal constitutional rights before custodial interrogation*, 31 A.L.R.3d 565, §2(c) (2010); Wayne R. LaFave, et al., 2 *Criminal Procedure*, 731-732 (3rd ed. 2007).

Some jurisdictions, such as North Carolina, recognized that no consensus existed in *Alvarado* on the question of age, but adopted the view that consideration of age could be seen as importing a subjective standard. *In re J.D.B.*, 363 N.C. 664, 672, 672 n.1, 686 S.E.2d 135, 140, 140 n.1 (2009). *Accord People v. Croom*, 379 Ill. App. 3d 341, 351, 883 N.E.2d 681, 689 (2008); *In the Interest of C.S.C.*, 118 P3d 970, 977-978 (Wyo. 2005). Additional jurisdictions cited *Alvarado* in their custody analyses, but expressly did not determine whether *Alvarado* foreclosed consideration of age. *State*

v. Bogan, 774 N.W.2d 676, 681 n.1 (Iowa 2009); *In re Tyler F.*, 276 Neb. 527, 538-540, 755 N.W.2d 360, 370-372 (2008); *In re J.H.*, 928 A.2d 643, 650 (D.C. 2007).

Courts that continue to include age among the factors in the custody analysis rejected *Alvarado*'s concern that such consideration would impose an undue burden on police of "'anticipating the frailties or idiosyncrasies of every person whom they question.'" *Alvarado*, 541 U.S. at 662 (quoting *Berkemer*, 468 U.S. at 442 n.35) (citation and internal quotation marks omitted). As *Roper* and *Graham* made clear, the frailties of minors are readily apparent and scientifically demonstrable. Juvenile offenders *are* objectively vulnerable. *Roper*, 543 U.S. at 573. These frailties are a matter of "ordinary common sense." *Alvarado*, 541 U.S. at 670 (Breyer, J., dissenting).

As to children like J.D.B., who was far younger than seventeen-and-one-half-year-old Alvarado, "[t]he police should have no difficulty recognizing that their suspect is a juvenile and adjusting their determination whether the suspect would understand his freedom of movement to be constrained accordingly." *Murray v. Earle*, 405 F.3d 278, 287 (5th Cir. 2005). This is particularly true when, as here, a police officer chooses to interview a child at a middle school, since no possible misconception about the child's juvenile status could exist. "Officers questioning students at school are well aware of the students' status as minors. As to elementary and middle-school students, their minority is virtually certain and their susceptibility to coercion great." Paul Holland, *Schooling Miranda: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 Loy. L. Rev. 39, 85 (2006). In the instant case,

> the difficulty of guessing defendant's age [was] nonexistent. Investigator DiCostanzo sought out J.D.B. at a middle school, where he knew J.D.B. was a seventh-grade student. All seventh graders are juveniles, roughly between the ages of twelve and fourteen, and as Investigator DiCostanzo testified, he was able to obtain J.D.B.'s exact age from school records. Therefore, defendant's 'frailty' – his youth – was evident from the very location Investigator DiCostanzo selected to conduct the interrogation.

J.D.B., 363 N.C. at 675-676, 686 S.E.2d at 142 (Brady, J., dissenting).

Moreover,

> The decision to interview a student at school could be made to take advantage of the student's minority [age]. Questioning the student at school, the officer not only takes advantage of the student's compulsory presence at school and the background norm of submission to authority, but also chooses to interact with a student at a time when the student will not be in the presence of a parent, the figure most likely to have the inclination or ability to either arrange for the presence of counsel or to advise the youth to refuse to answer the officer's questions.

Holland, *supra*, 52 Loy. L. Rev. at 85 n.175 (quoted in *J.D.B.*, 363 N.C. at 683, 686 S.E.2d at 147 (Hudson, J.,

dissenting)). Middle-school students "lack some of the most fundamental rights of self-determination – including even the right of liberty in its narrowest sense, *i.e.*, the right to come and go at will." *Vernonia Sch. Distr. 47J v. Acton*, 515 U.S. 646, 654 (1995). The age of schoolchildren cannot be ignored in a custody analysis, since objectively children at school are "instructed to obey the requests and directives of adults." *J.D.B.*, 363 N.C. at 677, 686 S.E.2d at 143 (Brady, J., dissenting). "The Student Handbook at Smith Middle School... instruct[ed] students to '[f]ollow directions of all teachers/adults the first time they are given,' '[s]top moving when an adult addresses' them, and '[w]alk away only after the adult has dismissed' them." *Id.* When Investigator DiCostanzo finally told J.D.B. that he was free to leave, he nonetheless did not dismiss him, as DiCostanzo coupled the statement with an entreaty to stay and listen to what he had to say. (J.A. 112a) J.D.B., who had been threatened with secure custody, which "certainly qualifies as an indicium of formal arrest," *id.* at 680, 686 S.E.2d at 145, was released only after Investigator DiCostanzo directed him to go home to await further investigation. *See In re R.H.*, 2008 Ohio 773, 2008 Ohio App. LEXIS 672 (2008) (child's ability to terminate an interview is hampered by clearly limited control over his own presence).

Since *Miranda* was announced forty-four years ago, "law enforcement has grown in constitutional as well as technological sophistication, and there is little reason to believe that the police today are unable, or even generally unwilling, to satisfy *Miranda*'s requirements." *Withrow v. Williams*, 507 U.S. 680, 695 (1993). Ten years after *Dickerson v. United States*, 530 U.S. 428

(2000), *Miranda* has become even more "embedded in routine police practice to the point where the warnings have become part of our national culture." *Id.* at 443. With police already factoring in age in selecting the setting of the interrogation, the themes pursued, the entreaties made, and the lines uttered, with an eye toward the validity of a waiver and ultimate voluntariness of the statement, ignoring age — while considering every other objective factor present in the encounter — would undermine the purpose of *Miranda* and lead to exploitation of a vulnerable segment of society long deemed to merit "a degree of increased care." Park, *supra*, 95 J. Crim. L. & Criminology at 882.

"Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly...in those types of situations in which the concerns that powered the decision are implicated." *Berkemer*, 468 U.S. at 437. *Accord Seibert*, 542 U.S. at 618-619 (Kennedy, J., concurring). A thirteen-year-old at school escorted by a uniformed police officer to an interrogation, questioned by police officers and school officials in a closed conference room about an off-campus incident, not initially advised that he was free to terminate the encounter, and subjected to interrogation techniques designed to compel an incriminating statement, is a situation that implicates those concerns.

Because the custody determination involves an evaluation of all circumstances, no one circumstance, including age, could be determinative. *J.D.B.*, 196 N.C. App. at 239, 674 S.E.2d at 799; *Howard*, 92 P.3d at 450. Thus, holding that courts, expert in evaluation of juvenile confession issues, *Fare*, 442 U.S. at 725, can weigh age

when evaluating all of the circumstances surrounding an interrogation would not render inadmissible all unwarned juvenile confessions. Even with age factored into the analysis, not all police-juvenile interactions would meet the test for custodial interrogation. It would simply acknowledge the objective fact that a six-year-old is not sixty, *see* N.C. Gen. Stat. §7B-1501(7) (2010) (children younger than six cannot be charged with a crime), "*ensure* that the police do not coerce or trick captive suspects into confessing...[and] relieve the inherently compelling pressures generated by the custodial setting itself, which work to undermine the individual's will to resist." *Berkemer*, 468 U.S. at 433 (internal quotation marks omitted) (emphasis in original).

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of North Carolina should be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

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J.D.B.,

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v.

STATE OF NORTH CAROLINA,

Respondent.

On Writ of Certiorari to the Supreme Court of North Carolina

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QUESTION PRESENTED

Whether a court must consider the age of a juvenile in determining whether he is "in custody" for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966).

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STATEMENT

1. On September 24, 2005, the Chapel Hill, North Carolina Police Department received a report that two homes in the same neighborhood had been broken into. (J.A. 97a, 106a) Various items, including a digital camera, cell phone, and jewelry were stolen. (J.A. 97a, 106a-107a, 111a-113a, 122a)

Shortly after the break-ins, Chapel Hill Police Officer Andy Ennis stopped and briefly questioned two boys he saw looking into a back window at one of the two homes. (J.A. 107a, 111a) One of the boys, J.D.B., gave Officer Ennis a fictitious first name. (J.A. 107a, 111a, 122a) Officer Ennis also spoke to J.D.B.'s grandmother and aunt, who expressed hostility that J.D.B. had been stopped because they believed the stop was racially motivated. (J.A. 117a, 125a)

On September 26, 2005, Juvenile Investigator Joseph DiCostanzo of the Chapel Hill Police Department was assigned to the case. (J.A. 98a, 106a, 122a) When Investigator DiCostanzo interviewed one of the home owners (Paula Hemmer), she identified J.D.B. as a potential culprit. (J.A. 107a, 122a) Ms. Hemmer informed the investigator that J.D.B. had previously cut her grass, but she no longer employed him for yard services because she had lost her job. (J.A. 107a, 111a) Investigator DiCostanzo then asked Officer Ennis to look through a Smith Middle School year book to see if he could identify the boys he questioned on the day of the break-ins. (J.A. 107a,

122a) Officer Ennis identified a picture of J.D.B. (J.A. 107a, 122a)

On September 29, 2005, Smith Middle School Resource Officer Curt Gurley called Investigator DiCostanzo to inform him that a digital camera found at the school possibly matched the camera stolen during the break-ins. (J.A. 91a, 107a-108a, 122a) J.D.B. was a thirteen-year-old seventh grader enrolled in special education classes at Smith Middle School. (J.A. 143a) Investigator DiCostanzo went to the school and met with Officer Gurley, Assistant Principal David Lyons, and Mr. Lyons' intern. (J.A. 98a, 108a) He advised the school officials that there was information linking J.D.B. to the break-ins and asked them to verify J.D.B.'s date of birth, address, and parent contact information from his school records. (J.A. 124a-125a)

Mr. Lyons stated that he wanted to be involved in the interview of J.D.B. because a parent had found the camera and returned it to the school. (J.A. 108a) Investigator DiCostanzo agreed that Mr. Lyons should be a part of the interview. (J.A. 108a-109a)

Investigator DiCostanzo, Mr. Lyons, Mr. Benson, and Officer Gurley went into a conference room that had a large table with seating for twelve people. (J.A. 109a-110a, 126a) Investigator DiCostanzo first interviewed two female students who had seen J.D.B. with the camera. (J.A.110a, 122a-123a)

J.D.B. was then brought from his last class of the day to the conference room.[1] (J.A. 92a, 98a, 104a, 109a, 126a-127a, 144a)

When J.D.B. entered the room, Investigator DiCostanzo, who was wearing a suit jacket, a tie and slacks, introduced himself as a juvenile investigator with the Chapel Hill Police Department. (J.A. 110a, 127a) Investigator DiCostanzo told J.D.B. that he wanted to follow-up with him about his conversation with police officers the previous weekend and asked if J.D.B. "wanted to talk with [him] about it." (J.A. 110a) J.D.B. responded that he would be willing to talk. (J.A. 110a) J.D.B. explained to the officer that on that day, he was asking people if they needed their yard mowed. While going to various houses, the police stopped him, and J.D.B. then went home. (J.A. 110a)

Before the interview began, Investigator DiCostanzo engaged J.D.B. in "small talk" about sports and his siblings. (J.A. 114a, 127a, 144a) He then asked for more details about what happened over the weekend, such as which house the boys went to first. (J.A. 110a) J.D.B. replied that he and a boy named Jacob first went to Paula Hemmer's house because she was a regular customer, but she was not at home. (J.A. 110a-111a, 145a) After

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[1] The record is unclear as to who brought J.D.B. to the conference room, and the trial court made no factual findings on this specific point.

leaving Ms. Hemmer's house, they went to several other houses and knocked on the front doors. (J.A. 111a) They did not call any of the houses beforehand, but J.D.B. had previously put out some flyers offering to walk his neighbors' dogs. (J.A. 111a, 145a)

Investigator DiCostanzo asked J.D.B. to tell him about the time that Ms. Hemmer came home and found J.D.B. and his brother behind her house. (J.A. 111a, 130a) J.D.B. replied that they were "cutting through" her yard and that he asked Ms. Hemmer if he could cut her grass. Investigator DiCostanzo told J.D.B. that he knew Ms. Hemmer had lost her job and that she told J.D.B. he would not be able to cut her grass for the entire year. J.D.B. did not respond. (J.A. 111a) Investigator DiCostanzo then told J.D.B. he had the camera that was stolen from one of the homes that had been broken into, and Officer Gurley showed it to J.D.B. (J.A. 111a, 116a, 129a-130a, 146a)

At that point, J.D.B. became quiet, and Mr. Lyons encouraged J.D.B. "to do the right thing because the truth always comes out in the end." (J.A. 112a, 129a, 146a) J.D.B. asked "if he got the stuff back was he still gonna be in trouble." (J.A. 112a) Investigator DiCostanzo replied "that it would help to get the items back but that * * * this thing is going to court." (J.A. 112a, 130a) He also explained that a secure custody order could be obtained, "if [he] felt that [J.D.B.] was going to go out and break into

other people's houses again." (J.A. 112a) J.D.B. asked what a secure custody order was, and Investigator DiCostanzo explained "that it's where you get sent to juvenile detention before court." (J.A. 112a, 130a-131a)

At that point, Investigator DiCostanzo told J.D.B., "you don't have to speak to me; you don't have to talk to me; if you want to get up and leave, you can do so," but added that he hoped J.D.B. would listen to what he had to say. (J.A. 112a) Investigator DiCostanzo also asked J.D.B., "do you understand you're not under arrest and you don't have to talk to me about this," and J.D.B. "nodded his head yes." (J.A. 112a, 121a, 131a) J.D.B. then admitted that he and Jacob went into one of the houses and took a camera and cell phone. (J.A. 112a) He said it was Jacob's idea and that Jacob had the cell phone and charger. (J.A. 113a)

Investigator DiCostanzo asked J.D.B. about the other residence, and J.D.B. replied that Jacob had all the jewelry. (J.A. 113a) Investigator DiCostanzo asked how they got into the houses, and J.D.B. replied that the doors were unlocked. (J.A. 113a) He also stated that he placed the jewelry and other items in a backpack and left it outside his house before the police stopped him later that day. (J.A. 113a)

Investigator DiCostanzo asked J.D.B. to put his statement into writing to make sure he understood it

correctly. (J.A. 113a) J.D.B. wrote: "Sunday me and Jacob went to Paula's house and stole cell phone and camera and he stole some jewelry. The jewelry was taken out of Paula's house and we went back home and put it in the book bag." (J.A. 113a) J.D.B. signed the statement and wrote underneath his signature, "I'm gonna get Jacob to give the jewelry back." (J.A. 113a)

The school bell rang, signaling the end of the school day. (J.A. 113a) Investigator DiCostanzo asked J.D.B. how he normally got home, and J.D.B. stated that he rode the school bus. (J.A. 114a) Investigator DiCostanzo told J.D.B. to go ahead and leave, so he would not miss the bus. (J.A. 132a) He also told J.D.B. that he would see him in a little while because he was going to J.D.B.'s house to speak with his grandmother and aunt. (J.A. 114a, 132a)

J.D.B.'s interview lasted approximately thirty to forty-five minutes. (J.A. 116a) During the interview, J.D.B. "was surprisingly calm, spoke clearly, asked questions when he needed to," and did not attempt to leave the room or ask for a parent to be present. (J.A. 115a-116a) None of the other adults in the room said anything to J.D.B., except for the one instance when Mr. Lyons encouraged him to tell the truth. (J.A. 116a, 154a) The door to the conference room was closed during the interview. (J.A. 141a, 146a)

After the interview, Investigator DiCostanzo believed he had enough information to obtain a search warrant for J.D.B.'s residence. (J.A. 117a) He did not believe the family would consent to a search based upon the hostility they expressed about J.D.B.'s initial encounter with police. (J.A. 117a, 134a)

When Investigator DiConstanzo returned to the police department, his supervisor expressed concern that J.D.B. could potentially go home and destroy evidence. (J.A. 117a-118a) His supervisor also stated that someone needed to inform J.D.B.'s grandmother that a search warrant was being obtained. (J.A. 118a) Investigator DiCostanzo therefore drove Investigator Jay Hunter to J.D.B.'s house to speak with his grandmother, J.D.B.'s legal guardian. (J.A. 118a, 125a, 133a-134a)

When they arrived at J.D.B.'s house, the investigators knocked on the door, but no one answered. (J.A. 118a, 132a-133a) At that time, J.D.B. got off the school bus and invited the officers to come inside and look around, so he could give them the jewelry. (J.A. 118a, 134a-135a) Investigator DiCostanzo told J.D.B. that J.D.B. could not provide consent for a search and asked if J.D.B. would mind staying outside with Investigator Hunter, while he went to get a search warrant. (J.A. 118a, 134a-135a) While Investigator Hunter and J.D.B. waited outside in an open carport, J.D.B. reached into his pocket, pulled out one of Ms.

Hemmer's rings, and gave it to Investigator Hunter. (J.A. 118a, 35a)

When Investigator DiCostanzo returned with the search warrant, J.D.B. took the officers inside his home and led them to where he had hidden the stolen jewelry. (J.A. 118a) J.D.B. told the officers he had thrown some other items on top of a shed at the BP gas station, which was just around the corner, and offered to take them there. (J.A. 118-119a, 137a-138a, 152a) The three of them walked to the gas station, where Investigator DiCostanzo climbed up on the shed and found more jewelry. (J.A. 119a, 137a-138a, 152a)

2. On October 19, 2005, juvenile petitions were filed against J.D.B. in Orange County District Court. Each petition alleged one count of felonious breaking and entering and one count of larceny. (J.A. 6a) On December 1, 2005, J.D.B.'s counsel filed a motion to suppress his statements and the evidence seized by the officers. (J.A. 88a-94a)

The trial court, concluding that J.D.B. was not in custody while questioned by police, denied J.D.B.'s motion to suppress. (J.A. 95a-96a) On January 24, 2006, J.D.B. admitted the allegations in the petitions, but renewed his objection to the denial of his motion to suppress. (J.A. 6a-7a) The trial court entered an order adjudicating J.D.B. a delinquent juvenile, and J.D.B. appealed the order to the North Carolina Court of Appeals. (J.A. 6a-7a)

On May 15, 2007, the North Carolina Court of Appeals issued an opinion remanding the case to the trial court for findings of fact. *In re J.B.*, 644 S.E.2d 270 (N.C. Ct. App. 2007) (unpublished). (J.A. 74a-87a) On October 16, 2007, the trial court entered an order making written findings of fact and conclusions of law to support its denial of J.D.B.'s motion to suppress. (J.A. 97a-102a) Specifically, the trial court found that J.D.B. consented to speak with police; J.D.B. was not in custody when interviewed by Investigator DiCostanzo; and all of the statements made by J.D.B. were voluntary. (J.A. 98a-102a)

J.D.B. again appealed the denial of his motion to suppress. (J.A. 11a) On April 7, 2009, a divided panel of the North Carolina Court of Appeals affirmed the trial court's denial of J.D.B.'s motion to suppress. *In re J.D.B.*, 674 S.E.2d 795 (N.C. Ct. App. 2009). (J.A. 48a-73a) On December 11, 2009, the North Carolina Supreme Court issued an opinion affirming the decision of the Court of Appeals. *In re J.D.B.*, 686 S.E.2d 135 (N.C. 2009). (J.A. 6a-47a) The North Carolina Supreme Court concluded that the test for determining whether a suspect is in custody for purposes of *Miranda* warnings is an objective inquiry. *Id.* at 138. Noting that an objective rule provides clear guidance for police, the North Carolina Supreme Court "decline[d] to extend the test for custody to include consideration of the age and academic standing of [the suspect.]" *Id.* at 140. The court held that because J.D.B. was not in

custody at the time of his statements, he was not entitled to the protections of *Miranda*. *Id.* The North Carolina Supreme Court therefore affirmed J.D.B.'s adjudication as a delinquent. *Id.* Three of the justices of the North Carolina Supreme Court dissented based on their belief that age is a relevant consideration in determining whether a suspect would have believed himself to be in custody. *See id.* at 146 (Hudson, J., dissenting).

SUMMARY OF ARGUMENT

The protections afforded by *Miranda v. Arizona*, 384 U.S. 436 (1966), only arise when a suspect is in custody (*i.e.*, when the suspect is under formal arrest or the suspect's freedom of movement is restrained in such a way as to be the functional equivalent of an arrest). Here, the trial court, the North Carolina Court of Appeals and the North Carolina Supreme Court properly held that petitioner was not subjected to a custodial interrogation because he was not placed under formal arrest nor was there a restraint on petitioner's freedom of movement of the degree associated with a formal arrest. Petitioner attacks these determinations, asserting that the North Carolina courts erred by failing to apply a "reasonable juvenile standard" in evaluating whether Petitioner was in custody. Petitioner's argument is inconsistent with this Court's repeated recognition that *Miranda's* custody test is an objective, rather than subjective, determination. The subjective test advocated by petitioner cannot be

readily and consistently applied by law enforcement officers and would undercut the clear and concrete guidelines that this Court's precedents have laid out for officers to follow.

Whether a suspect is in custody depends on "the objective circumstances of the interrogation" and not the subjective views of either the suspect or the police. *Stansbury v. California*, 511 U.S. 318, 323 (1994). Otherwise, police would be placed in the untenable position of having to evaluate the frailties and idiosyncracies of potential suspects interviewed in the course of an investigation. *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984). Personal characteristics such as a suspect's age, prior involvement with law enforcement, intelligence and maturity may ultimately impact how a suspect perceives his present situation, but it is not fair to law enforcement officers to require them to step into the shoes of a suspect and speculate how that unique individual may subjectively evaluate whether he or she is free to leave. Whether police should administer *Miranda* warnings to a suspect should not be tied to what the suspect may be thinking. *Miranda* works because it sets a clear bright-line rule for police to follow: If the objective factors relating to the interrogation (*e.g.*, the length and location of the interrogation, the use of handcuffs or other restraints, and whether the suspect was informed that he or she was free to leave) establish that the suspect is in custody, warnings must be given.

Factors, such as age, which go to how a suspect may internalize and perceive the circumstances of an interrogation should not play a role in the *Miranda* custody determination. Although a suspect's age must be considered in the determining whether a confession was given voluntarily, age should play no role in the *Miranda* analysis. The voluntariness test and the *Miranda* test serve two different purposes. Under the voluntariness test, courts must consider whether a defendant's will was overborne – a determination that can only be made by considering the personal characteristics of the defendant. In contrast, the *Miranda* rule was intended to cut through the difficulties of making such a subjective determination. Under *Miranda*, one size fits all; if there has been a formal arrest or the functional equivalent of an arrest, *Miranda* warnings must be given even if there is absolutely no risk that the defendant's will had been overborne.

Petitioner and his amici assert that this Court's decisions in *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 130 S. Ct. 2011 (2010), require consideration of age in the *Miranda* custody analysis. Neither opinion, however, compels that the objective nature of the *Miranda* test should be abandoned by this Court. Rather, *Simmons* and *Graham* instruct that attempting to evaluate the effect of age is fraught with difficulty and uncertainty. *Simmons* and *Graham* illustrate that law enforcement officers should not be saddled with the difficulty of making such determinations in the

field. Accordingly, the effect of age should be left to courts to determine under the voluntariness test. Petitioner has offered no sound reason for dramatically altering the objective nature of the *Miranda* custody test.

ARGUMENT

AGE IS NOT A RELEVANT CONSIDERATION IN THE OBJECTIVE TEST USED TO DETERMINE CUSTODY FOR *MIRANDA* PURPOSES.

Pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), law enforcement officers must give certain Fifth Amendment warnings to a person in order for statements made by that person during custodial interrogation to be admissible in the State's case-in-chief. These warnings are required *only* if there has been such a restriction on a person's freedom as to render him or her in custody. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam).

In this case, the Supreme Court of North Carolina held that petitioner was not entitled to the protections of *Miranda* because he was not in custody. Petitioner now contends the court erred by failing to consider his age as a factor in determining whether he was in custody for *Miranda* purposes.

For nearly half a century, this Court has required law enforcement officers deciding whether a

person is in custody for *Miranda* purposes to consider only those objective circumstances of the interrogation that are readily observable. If the custody test is expanded beyond those circumstances to include personal characteristics like age, officers will have to determine how those personal characteristics subjectively affect the mindset of the person being questioned in order to decide whether *Miranda* warnings are necessary. By requiring consideration of these subjective factors, the clarity of the concrete guidelines now used by officers in determining custody would be compromised significantly without compelling justification.

A. The *Miranda* Rule Was Created To Reduce The Likelihood Of Involuntary Confessions and To Give Law Enforcement Officers And Courts Clear Guidelines To Follow.

Prior to the creation of the *Miranda* rule, courts only "evaluated the admissibility of a suspect's confession under a voluntariness test." *Dickerson v. United States*, 530 U.S. 428, 433 (2000). Pursuant to this due process voluntariness test, a court determines whether a "defendant's will was overborne at the time he confessed," *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963), by engaging in "a weighing of the circumstances of pressure against the power of resistance of the person confessing." *Stein v. New York*, 346 U.S. 156, 185 (1953).

The due process voluntariness test considers "both the characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). Relevant factors to consider in determining voluntariness under the test include: the youth of the accused, *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (plurality opinion); lack of education, *Payne v. Arkansas*, 356 U.S. 560, 566-67 (1958); low intelligence, *Fikes v. Alabama*, 352 U.S. 191, 198 (1957); length of detention, *Chambers v. Florida*, 309 U.S. 227, 238-39 (1940); repeated and prolonged nature of the questioning, *Ashcraft v. Tennessee*, 322 U.S. 143, 153-54 (1944); and the use of physical punishment, *Reck v. Pate*, 367 U.S. 433, 441-44 (1961).

To supplement the voluntariness test, this Court created the *Miranda* rule, *Michigan v. Mosley*, 423 U.S. 96, 112 (1975), in part because "the advent of modern custodial police interrogation brought with it an increased concern about confessions obtained by coercion." *Dickerson*, 530 U.S. at 434-35. The rule is a prophylactic rule "designed to counteract the 'inherently compelling pressures' of custodial interrogation," *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991), and to thereby "reduce the likelihood of involuntary confessions." 2 Joseph G. Cook, *Constitutional Rights of the Accused* § 6.38 (3d ed. 1996).

This Court also created the *Miranda* rule to provide clear guidelines for law enforcement officers

because the voluntariness test alone had been "difficult * * * for law enforcement officers to conform to, and for courts to apply in a consistent manner." *Dickerson*, 530 U.S. at 444. In contrast to the voluntariness test, "*Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation." *Fare v. Michael C.*, 442 U.S. 707, 718 (1979). The rule's "concrete constitutional guidelines for law enforcement agencies and courts," *Miranda*, 384 U.S. at 442, greatly simplify the initial threshold determination of whether a suspect should be warned about his or her constitutional rights.

The *Miranda* rule is "not intended to hamper the traditional function of police officers in investigating crime." *Miranda*, 384 U.S. at 477. Indeed, society has a "legitimate and substantial interest in securing admissions of guilt." *Moran v. Burbine*, 475 U.S. 412, 427 (1986). Without police questioning of suspects, "the security of all would be diminished" because "those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved." *Bustamonte*, 412 U.S. at 225.

This Court has stated:

> [F]ar from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently

> desirable. In addition to guaranteeing the right to remain silent unless immunity is granted, the Fifth Amendment proscribes only self-incrimination obtained by "genuine compulsion of testimony." Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions.

United States v. Washington, 431 U.S. 181, 187 (1977) (quoting *Michigan v. Tucker*, 417 U.S. 433, 440 (1974)). While the *Miranda* rule recognizes that "the interrogation process is 'inherently coercive,'" *Burbine*, 475 U.S. at 426, this Court has further recognized that "[t]he Constitution does not prohibit every element which influences a criminal suspect to make incriminating admissions." *Washington*, 431 U.S. at 187.

B. The Custody Test Is An Objective Test That Considers Circumstances Of The Interrogation Easily Perceived By The Parties.

In light of the purposes of the *Miranda* rule – to reduce the likelihood of involuntary confessions and to give law enforcement officers concrete guidelines to follow – and in contrast to the voluntariness test, the custody test under *Miranda* is "an objective test." *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). In this objective test, "the only relevant inquiry is how a reasonable man in the suspect's position

would have understood his situation." *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984).

In determining how a reasonable person would have understood his or her situation, the "ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam) (quotations and citation omitted). "[T]he initial determination of custody depends on the *objective circumstances of the interrogation*, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California*, 511 U.S. 318, 323 (1994) (emphasis added); *see also Beheler*, 463 U.S. at 1125 n.3 (rejecting the argument that the respondent, who had been drinking and was emotionally distraught, was in custody because he lacked awareness of the consequences of his participation in the interview). Further, the test for custody does not "'place upon the police the burden of anticipating the frailties or idiosyncracies of every person whom they question.'" *McCarty*, 468 U.S. at 442 n.35 (quoting *People v. P.*, 233 N.E.2d 255, 260 (N.Y. 1967)).

Because of the objective nature of the custody test, this Court has not considered the personal characteristics of the suspect in determining whether there was a restraint on freedom of movement of the degree associated with a formal arrest. In deciding whether "indicia of arrest [are]

present" such that a suspect is in custody, *Beheler*, 463 U.S. at 1123, this Court instead has considered various objective facts related to the interrogation itself that can be easily perceived by both the suspect and law enforcement officers. These include: where the interrogation took place, *see Beckwith v. United States*, 425 U.S. 341, 343-44 (1976) (holding questioning at suspect's home was non-custodial); the use of force or restraints, *see New York v. Quarles*, 467 U.S. 649, 655 (1984) (holding questioning was custodial in part because the suspect was handcuffed); the length of questioning, *see McCarty*, 468 U.S. at 441 (holding traffic stop was not custodial due in part because of short time period between stop and formal arrest); the number of officers present, *see Quarles*, 467 U.S. at 655 (holding questioning was custodial in part because the suspect was surrounded by four officers); and communications made to the accused indicating whether he or she was free to leave, *see Stansbury*, 511 U.S. at 325 ("An officer's knowledge or beliefs may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned.").

C. The Effect Of Age Is A Subjective Factor, The Consideration Of Which Would Significantly Reduce The Clarity Of Guidelines By Which Officers Decide Whether Warnings Are Necessary.

While officers may in some instances – as in this case – know the age of the person they are questioning, the subjective effect of that person's age on his or her perception of custody is internal to that person rather than a factor that can be easily perceived by the officers. *See Yarborough v. Alvarado*, 541 U.S. 652, 669 (2004) (O'Connor, J., concurring) ("Even when police do know a suspect's age, it may be difficult for them to ascertain what bearing it has on the likelihood that the suspect would feel free to leave."). As a result, "consideration of a suspect's individual characteristics – including his age – could be viewed as creating a subjective inquiry. Cf. *Mathiason*, 429 U.S., at 495-96 (noting that facts arguably relevant to whether an environment is coercive may have 'nothing to do with whether [a suspect] was in custody for purposes of the *Miranda* rule')." *Alvarado*, 541 U.S. at 668 (plurality opinion).

In implementing *Miranda*, this Court recognized "the importance of a workable rule to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they

confront." *Quarles*, 467 U.S. at 658 (quotations and citations omitted). Because *Miranda* was intended to give law enforcement officers clear guidelines to use in the field, this Court has "over the years refused to sanction attempts to expand [the] *Miranda* holding." *Id.* at 658. For that reason, "the simplicity and clarity of the holding of *Miranda*" should not be compromised "[a]bsent a compelling justification." *McCarty*, 468 U.S. at 432.

Easily perceived circumstances external to the person being interviewed can be assessed quickly by officers. It is not difficult for officers to understand the effect of handcuffs on a suspect, a locked door, or even the impact that hours of questioning would have on a person's view of whether he or she was free to leave.

By contrast, how a thirteen-year-old suspect would react to certain circumstances compared to a seventeen-year-old suspect would be difficult for officers to determine without knowing more about the mindset of that person. *See* Wayne R. LaFave, *Criminal Procedure* § 6.6(c) (3d ed. 2007) ("[I]t is generally unwise to formulate rules for the police in terms of what someone else is thinking."). A thirteen-year-old suspect who has considerable experience with the criminal justice system might react much differently from a seventeen-year-old with no similar experience, but this Court already has held that whether a suspect has this type of experience is not a factor in the custody test. *See*

Alvarado, 541 U.S. at 668 (holding that "reliance on Alvarado's prior history with law enforcement was improper not only under the deferential standard * * *, but also as a *de novo* matter").

It is true that some courts have held that age should be considered in the custody test.[2] However, these courts have failed to recognize the diminished clarity of the guidelines for custody determinations when the subjective factor of the effect of age is added to the custody test.

Although many courts have not addressed or have not resolved the issue of whether the effect of

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[2] *See, e.g., In re Jorge D.*, 43 P.3d 605, 608-09 (Ariz. Ct. App. 2002) ("We conclude that the objective test for determining whether an adult was in custody for purposes of Miranda, * * * applies also to juvenile interrogations, but with additional elements that bear upon a child's perceptions and vulnerability, including the child's age, maturity and experience with law enforcement and the presence of a parent or other supportive adult."); *People v. Howard*, 92 P.3d 445, 450 (Colo. 2004) ("The age of the juvenile is a factor to be considered by the court, though it will not constitute the determinative factor in a finding of custody."); *In re Joshua David C.*, 698 A.2d 1155, 1162 (Md. 1997) ("In regard to juveniles, we have added the caveat that 'it is reasonable * * * for courts to apply a wider definition of custody for Miranda purposes' * * * * Indeed, in determining whether a juvenile's statement was made while in custody, the court must consider additional factors, such as the juvenile's education, age, and intelligence.").

age should be considered in the custody test,[3] courts in at least seven jurisdictions in addition to North Carolina have concluded that age is not a relevant factor.[4] These courts have correctly recognized that

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[3] *See, e.g., In re Tyler F.*, 755 N.W.2d 360, 371 (Neb. 2008) (declining to resolve the issue of whether age should be considered in the custody test, but noting that "it would be difficult to take a suspect's age into account in any principled manner").

[4] *See, e.g., State v. Turner*, 838 A.2d 947, 963 (Conn. 2004) (disagreeing with the defendant's contention that his youth and unfamiliarity with the legal system should be considered in determining whether he was in custody because "when determining whether a *reasonable person* would have felt that he or she was free to leave, courts are to apply an *objective*, rather than a subjective, standard"), *cert. denied*, 543 U.S. 809 (2004); *In re J.F.*, 987 A.2d 1168, 1175 (D.C. 2010) (declining to consider the juvenile's age); *People v. Croom*, 883 N.E.2d 681, 689 (Ill. App. Ct.) ("Given the Supreme Court's emphasis on objectiveness, we decline to consider defendant's age when determining whether he was in custody for *Miranda* purposes"), *appeal denied*, 889 N.E.2d 1118 (Ill. 2008); *State v. Bogan*, 774 N.W.2d 676, 681 n.1 (Iowa 2009) (determining that a fourteen-year-old juvenile was in custody without consideration of his age because this Court questioned "whether age is a factor to consider under a federal constitutional analysis"); *State v. Morton*, 186 P.3d 785, 794 (Kan. 2008) ("Allowing the suspect's individual characteristics to be a part of the custody analysis, even if styled as an objective test – what would a reasonable person of the suspect's age, experience level, etc. have believed – would ruin [the clarity of the rule], as it would require police officers to consider a suspect's mindset when faced with deciding whether they

considering the effect of age in the custody test would render the test subjective and would require law enforcement officers to speculate about a suspect's state of mind before questioning.

Requiring consideration of the subjective effect of age on a person's view of custody would greatly diminish the clarity of the guidelines upon which law enforcement officers rely in making on-the-spot determinations of whether to give *Miranda* warnings. Without a compelling reason to add the subjective factor of the effect of age to the custody test, "the simplicity and clarity of the holding of *Miranda*" should not be compromised. *McCarty*, 468 U.S. at 432.

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are required to give *Miranda* warnings."), *cert. denied*, 129 S. Ct. 903 (2009); *In re W.B. II*, 2009 Ohio 1707, at P23 (Ohio Ct. App., 4th Dist. 2009) (stating that prior to *Alvarado*, the court considered factors "that are prone to result in a subjective analysis, *i.e.* the age, mentality and prior criminal experience of the accused * * * [but] we now renounce the subjective factors that we identified * * * and restrict our analysis to an objective test."); *CSC v. State*, 118 P.3d 970, 977-78 (Wyo. 2005) ("We cannot overstate the importance of having an objective test to guide the police in determining a suspect's custodial status. * * * It would be a great handicap to law enforcement to require them to speculate about the suspect's state of mind before deciding how they may interrogate him.").

D. The Objective *Miranda* Custody Test Differs From Tests In Other Contexts That Depend On A Person's Actual Mindset.

Petitioner and his amici note that age is considered in "reasonable person" tests in other areas of criminal law and in some civil law contexts. However, "[t]here is an important conceptual difference between the *Miranda* custody test and the line of cases from other contexts considering age and experience." *Alvarado*, 541 U.S. at 667.

The effect of age in these criminal and civil "reasonable person" tests is part of the deliberative after-the-fact assessment of the person's actions. The *Miranda* custody test, on the other hand, requires an on-the-spot determination of how a reasonable person would perceive the circumstances and does not involve the person's actions or personal characteristics. *See Alvarado*, 541 U.S. at 667 ("[T]he objective *Miranda* custody inquiry could reasonably be viewed as different from doctrinal tests that depend on the actual mindset of a particular suspect, where we do consider a suspect's age and experience."). If the *Miranda* custody test were otherwise, the on-the-spot determination in identical situations would always change based on the personal characteristics of the person being interviewed. This could not be the correct interpretation of the custody test as set out by this Court.

Unlike the objective question of whether a person is in custody, the question of whether a person voluntarily waived his *Miranda* rights by its very nature requires an inquiry into the thought processes and internal knowledge of the suspect inasmuch as a waiver of *Miranda* rights is valid only if "knowingly and intelligently" made. *Miranda*, 384 U.S. at 444. For that reason, the determination of whether a juvenile voluntarily waived his *Miranda* rights includes "inquiry into all the circumstances surrounding the interrogation" including "evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Michael C.*, 442 U.S. at 725; *see also North Carolina v. Butler*, 441 U.S. 369, 374-75 (1979) (holding "the question of waiver must be determined on the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused").

Likewise, this Court has stated that "[a]ny knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining" whether an interrogation has occurred. *Rhode Island v. Innis*, 446 U.S. 291, 302 n.8 (1980). Assuming the effect of age is an "unusual susceptibility to a particular form of persuasion," it makes sense that the question of whether there has

been an interrogation for *Miranda* purposes concerns the mindset of the person being questioned because "'[i]nterrogation,' as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." *Id.* at 300. By contrast, the *Miranda* custody test takes into consideration only objective circumstances that are readily observable and not the unusual susceptibilities of the person being questioned. *See McCarty*, 468 U.S. at 442 n.35 (noting that the test for custody has not taken into account the "frailties or idiosyncracies" of those questioned).

Tests used to determine whether a person acted in self-defense or under duress necessarily take into account the age of the actor. This is so because the focus of the inquiry, again, is on the mindset of that person in acting as he or she did. *See, e.g., State v. Marshall*, 692 P.2d 855, 857 (Wash. Ct. App. 1984) (holding the "juvenile status of a defendant is part of his situation and relevant to a determination of whether he acted reasonably" for purposes of showing self-defense).

In tests in which the focus is on the reason why a person acted as he or she did, it is appropriate to consider that person's state of mind. When the test is an objective one like the *Miranda* custody test, however, the issue is not why someone acted as they did. Therefore, state of mind is irrelevant.

E. Requiring The Consideration Of Age In The Custody Test would Open The Door To Consideration Of Myriad Other Subjective Circumstances.

If the effect of age is considered in custody determinations, then other subjective personal characteristics would presumably also bear on the custody analysis, including the suspect's education, intelligence, mental infirmities, cultural background, and any particular vulnerabilities he or she may have. Indeed, it would be impossible to know the effect of a suspect's age without considering how other personal characteristics would affect his or her view of custody.

In conducting an efficient and productive criminal investigation, officers should not be expected to factor in all possible subjective factors internal to the suspect that might have bearing on that person's beliefs about whether he or she was free to leave. *See Miranda*, 384 U.S. at 468-69 ("Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact.") (footnote omitted). Even if an officer had a psychiatric background and could determine these internal characteristics of a person and assess how they would affect that person's beliefs, this would greatly slow any investigation.

Consideration of other personal characteristics would especially be wide open if this Court were to adopt a "reasonable juvenile" standard rather than continuing to apply a "reasonable person" standard. If the effect of one's juvenile status can be considered in determining whether that person is in custody, then it is logical that the effect of many personal characteristics of a suspect could be included in the test by placing the word "reasonable" in front of them – *e.g.*, a "reasonable high school dropout standard" or a "reasonable ex-convict standard."

One of the reasons for the creation of the *Miranda* rule was that the voluntariness test was difficult for officers and courts to apply. To engraft the same requirements of consideration of personal characteristics onto the custody test that apply in the voluntariness test would result in "the simplicity and clarity of the holding of *Miranda*" being impaired without "compelling justification." *McCarty*, 468 U.S. at 432.

F. *Simmons* and *Graham* Have No Application To This Case.

Petitioner's reliance on *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 130 S. Ct. 2011 (2010), *see* Pet. Br. 26, is misplaced. Those decisions deal only with the *culpability* of juveniles, and, in any event, show that law enforcement officers should not be required to make on-the-spot

assessments of the effect of age on a suspect's view of custody.

In *Simmons*, this Court held that defendants who committed their crimes as a juvenile cannot be sentenced to death. In *Graham*, this Court further held that juveniles who committed crimes other than homicides cannot be sentenced to life imprisonment without parole. In both cases, this Court ruled that juveniles were less culpable for their crimes because they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Simmons*, 543 U.S. at 569. Petitioner cites these cases in support of his contention that the frailties and vulnerabilities of minors are so readily apparent that age must be factored into a *Miranda* custody determination.

Simmons and *Graham* have no application to this case. The question of whether a juvenile is in custody for *Miranda* purposes is an objective test that deals with the beginning of the judicial process, not a question related to the culpability of minors at the end of the judicial process.

Another reason *Simmons* and *Graham* have no application is that those cases impose categorical prohibitions. Recognizing the difficulty that a jury would have in distinguishing "between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption," this

Court in *Simmons* rejected a case-by-case determination of whether a death sentence was appropriate for a juvenile. *Simmons*, 543 U.S. at 573.

Petitioner and his amici propose that law enforcement officers in the field make exactly the same type of case-by-case analysis of the effect of age that this Court found too difficult for a jury to make even after the fact. *Simmons* and *Graham* teach that the effect of age simply is too difficult for officers to easily and quickly assess and should instead be left to courts to assess when applying the voluntariness test.

G. To The Extent That Juveniles Are More Vulnerable To Pressure Than Adults, The Voluntariness Test Takes This Into Account.

This Court has made it clear that *Miranda* does not dispense with the requirement that a confession be voluntary in order to be admitted into evidence. *Dickerson*, 530 U.S. at 444. Therefore, a suspect's rights remain protected – even where he or she is not in custody – by application of the voluntariness test. One of the personal characteristics of a suspect considered in the due process voluntariness test is age. *See Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (considering strongly the youth and immaturity of fourteen-year-old in determining voluntariness of confession); *Haley*, 332 U.S. at 599 (stating that

"special care in scrutinizing the record must be used" when voluntariness of a confession by a child is at issue).

Because there remains a possibility that a confession could be coerced even during non-custodial interrogation, a juvenile defendant may still allege that his will was overborne and his confession involuntary under the voluntariness test.[5] *See Beckwith*, 425 U.S. at 348 (holding that when a voluntariness claim is made, it is the duty of the appellate court "to examine the entire record and make an independent determination of the ultimate issue of voluntariness"). To the extent that juveniles may need special protection due to their age, they are therefore protected by the voluntariness test without transforming the *Miranda* custody test into something it is not.

As petitioner and his amici note, a number of States have by statute afforded juveniles additional protection during interrogation. Petitioner contends this is recognition by State legislatures of "the need to ensure that juveniles were made aware of their Fifth Amendment rights and, due to their age, assisted in exercising them." Pet. Br. 15. Not so.

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[5] Although petitioner raised a voluntariness claim in the trial court in addition to his *Miranda* claim, he did not bring forward that issue in the Supreme Court of North Carolina.

The overwhelming majority of the States that provide additional protections to juveniles do so in the custodial setting,[6] recognizing that some juveniles may need parental involvement or accommodations to fully understand their rights when in custody.[7] Those laws, by their nature, only

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[6] Although not bound to follow the *Miranda* custody test in interpreting their own statutes, these States have used the test as the trigger for application of additional protections for juveniles because it is easier for officers in these States to have one custody test rather than multiple ones. In light of the additional protections afforded a juvenile by these States after a determination that he or she is in custody, it is especially important for officers to have concrete guidelines to make the determination.

[7] *See, e.g.*, Ala. Code § 12-15-202 (Supp. 2010) (providing certain rights for juveniles in custody); Colo. Rev. Stat. § 19-2-511 (2010) (providing that statements of a juvenile made as a result of custodial interrogation are not admissible unless a parent or guardian was present); Kan. Stat. Ann. § 38-2333 (Supp. 2009) (providing that if a juvenile is under fourteen no confession "resulting from interrogation while in custody or under arrest" is admissible unless made following consultation between the juvenile's parent or attorney); Me. Rev. Stat. Ann. tit. 15 § 3203-A(2-A) (2003) (prohibiting a law enforcement officer from questioning a juvenile who has been arrested before making reasonable efforts to contact the juvenile's legal custodian); Mo. Rev. Stat. § 211.059 (2010) (providing that juveniles "taken into custody" have a right to have parent, guardian, or custodian present during questioning); N.Y. Fam. Ct. Act § 305.2 (2008) (prohibiting question of child in custody if child and parent have not been advised of child's rights); N.C. Gen. Stat. § 7B-2101 (2009) (providing that a

apply once the juvenile is found to be in custody under the objective test. They do not purport to add the effect of age to the consideration of custody for the purposes of *Miranda*.

In three States, statements of some juveniles are inadmissible even if made during non-custodial interrogation if a parent or attorney is not present.[8]

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juvenile in custody must be advised of his rights including the right to have a parent, guardian, or custodian present and that no in-custody admission or confession of a juvenile under fourteen may be admitted unless made in the presence of a parent, guardian, custodian, or attorney); Tex. Fam. Code Ann. § 51.095 (d) (2008) (providing for restrictions on the use of statements by children made while in custody).

[8] *See, e.g.*, Conn. Gen. Stat. § 46b-137 (2009) (providing that an admission by a child under the age of sixteen to a police officer or Juvenile Court official is inadmissible unless the statement was made in the presence of the child's parent or guardian after the child and the parent or guardian were advised of the child's rights); N.M. Stat. § 32A-2-14(F) (2010) (providing that "no confessions, statements or admissions may be introduced against a child under the age of thirteen years on the allegations of the petition" and that "[t]here is a rebuttable presumption that any confessions, statements or admissions made by a child thirteen or fourteen years old to a person in a position of authority are inadmissible"); W. Va. Code § 49-5-2 (2009) (providing that except for *res gestae*, extrajudicial statements made by juveniles under age sixteen are inadmissible unless made in the presence of any attorney or parent or guardian and only after the juvenile has been

These statutes are the product of legislative judgment, not a constitutional mandate. *See Oregon v. Hass*, 420 U.S. 714, 719 (1975) ("[A] State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards.").

H. The Location Of The Interview In This Case Does Not Impact Whether Age Should Be Considered In The Custody Determination.

Petitioner and his amici emphasize that he was interviewed at school. The impact of the school setting on whether petitioner was in custody is not before this Court, for petitioner's Question Presented asks only "[w]hether a trial court may consider a juvenile's age in a Fifth Amendment *Miranda* custody analysis." Pet. Br. i. That juveniles may be questioned at school has no bearing on whether age should be considered in determining whether a person is in custody for purposes of *Miranda*. The effect of age, even in a school setting, is not an objective circumstance that is readily observable by officers, even if the officer knows the age of the student.

Petitioner asserts that officers could have taken advantage of his age by interviewing him or her at

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informed of his or her rights)

school. *See* Pet. Br. 27. Even if this Court were to consider the setting in which the statements in this case were made, the questioning of petitioner by law enforcement officers in a school setting did not make the interview custodial.

It is true that the setting in which an interview takes place can have a bearing on whether a suspect was in custody. *See Beckwith*, 425 U.S. at 343-44 (holding questioning at suspect's home was non-custodial). At a police station, for instance, there undoubtedly is a certain amount of inherent coerciveness. Even so, questioning at a police station is not so inherently coercive that a person is automatically in custody. *See Mathiason*, 429 U.S. at 495 (holding that a non-custodial setting is not converted to a custodial one "simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment'" like a police station). Additional objective indicia of arrest are required in order to show restraint on freedom of movement of the degree associated with a formal arrest.

While it is true that students must follow certain rules when at school,[9] the school setting itself is a

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[9] Amicus American Civil Liberties Union argues petitioner may have been subject to prosecution under N.C. Gen. Stat. § 14-288.4(a)(6) if he had refused to answer the investigating officer's questions after an assistant principal

familiar one to a student. *See Mathiason*, 429 U.S. at 498 (Marshall, J., dissenting) (noting that *Miranda* placed great stress on being interrogated in "unfamiliar surroundings"). In that respect, it is less inherently coercive than a police station. *Cf. CSC v. State*, 118 P.3d at 977 (finding that the coercive elements of a police interview "were reduced by the fact that it took place at CSC's school, a location which was familiar to him, rather than at the police station); *People v. Savory*, 435 N.E.2d 226, 230 (Ill. App. Ct. 1982) (finding that a room adjacent to the principal's office was a "less coercive environment than a police station"). The interviewing of a student at school by a law enforcement officer does not automatically make questioning custodial.

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told him to "do the right thing." Br. for American Civil Liberties Union, at 10. That statute defines disorderly conduct as "a public disturbance intentionally caused by any person" who "[d]isrupts, disturbs or interferes with the teaching of students at any public or private educational institution or engages in conduct which disturbs the peace, order or discipline at any public or private educational institution or on the grounds adjacent thereto." In order for a person to be guilty of disorderly conduct on this basis, there must be a showing of "substantial interference with, disruption of and confusion of the operation of the school in its program of instruction and training of students there enrolled." *In re Eller*, 331 N.C. 714, 718, 417 S.E.2d 479, 482 (1992). Refusing to answer a police officer's questions, as petitioner had a right to do, would not qualify as "substantial interference" with operation of the school.

The record in this case shows that the investigating officer came to petitioner's school because he received a telephone call from the school informing him that an item taken during the break-ins had been recovered there. (J.A. 108a, 122a-123a) In addition, there were two other witnesses at the school whom the investigating officer interviewed. (J.A. 110a) When the officer began the interview of petitioner, he asked petitioner if he would agree to answer questions about the recent break-ins, and petitioner agreed. (J.A. 98a) At another point in the interview, the officer told petitioner he was free to leave. (J.A. 99a) And, in fact, petitioner later did leave. (J.A. 100a)

The clear implication of the officer asking petitioner if he would agree to answer questions and the officer's subsequent statement that petitioner was free to leave was that petitioner could have chosen not to answer questions and presumably could have returned to the classroom where he had been prior to the interview. While petitioner may not have been free to leave the school grounds because school regulations required him to remain, he would have been free to leave the interview and return to his classroom where no officers would be present.

* * *

Requiring officers in the field to assess the subjective effect of a person's age on that person's

view of custody will diminish significantly the clarity of the guidelines by which the officers must decide whether a person is in custody. Because the *Miranda* custody test always has been intended to be a workable rule for officers, there simply is no "compelling justification" to compromise the clarity of the guidelines. *McCarty*, 468 U.S. at 432.

CONCLUSION

The decision of the Supreme Court of North Carolina should be affirmed.

Respectfully submitted,

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REPLY BRIEF

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J.D.B.,

Petitioner,

v.

STATE OF NORTH CAROLINA

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In addition to the arguments and authorities presented in his Brief, J.D.B. responds as follows to matters raised in the State's Brief and those of its *amici*:

ARGUMENT

A TRIAL COURT MAY CONSIDER A JUVENILE'S AGE IN A FIFTH AMENDMENT *MIRANDA* CUSTODY ANALYSIS IN EVALUATING THE TOTALITY OF THE OBJECTIVE CIRCUMSTANCES AND DETERMINING WHETHER A REASONABLE PERSON IN THE JUVENILE'S POSITION WOULD HAVE FELT HE OR SHE WAS FREE TO TERMINATE POLICE QUESTIONING AND LEAVE.

Although the State and its *amici* disagree on whether age is an objective factor, it cannot be doubted that one's age is an historical fact. It is an objective circumstance, as it exists apart from thought. In asking this Court to exclude an objective circumstance from the custody inquiry and relegate it to a voluntariness inquiry, the State is asking the Court to partially overrule *Stansbury v. California*, 511 U.S. 318, 322 (1994) (per curiam), and return "to the old way of doing things, giving no warnings and litigating the voluntariness of any statement in nearly every instance." *Missouri v. Siebert*, 542 U.S. 600, 609 (2004). The true "slippery slope" the State asks this Court to slide down is to begin picking and choosing which objective circumstances to consider, when excluding this

objective circumstance would skew the custody analysis and thereby weaken Fifth Amendment guarantees for juveniles. J.D.B. is not asking this Court to expand *Miranda*. Instead, Respondent is asking this Court to strip *Miranda* of its effectiveness and do so for a segment of society long deemed worthy of protection.

Stansbury made clear that a "court must examine *all* of the circumstances surrounding the interrogation...." 511 U.S. at 322 (emphasis added). The players and scene must be accurately set in order "to resolve 'the ultimate inquiry': '[was] there a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.' *California v. Beheler*, 464 U.S. 1121, 1125, 77 L.Ed.2d 1275, 103 S.Ct. 3517 (1973) (*per curiam*) (quoting [*Oregon v.*] *Mathiason*, [429 U.S. 492] at 495 [(1977) (*per curiam*)]." *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). This inquiry is analyzed from the perspective of "how a reasonable person in the *suspect's* situation would perceive his circumstances." *Yarborough v. Alvarado*, 541 U.S. 652, 662 (2004) (emphasis added). Excluding any objective circumstance, and particularly the one that identifies the player in whose shoes the reasonable person is placed, and which renders him particularly vulnerable to the coercive nature of custodial interrogation, renders the result inaccurate and unreliable.

What varies in the custody equation is not which objective circumstances should be considered, but the effect or weight that any individual circumstance has. Contrary to the State's argument, there is only one circumstance which invariably imposes upon law enforcement the requirement to administer *Miranda* warnings: a police officer informing a suspect that he

is under arrest. Until that point, "some people are free to come and go...." *Stansbury*, 511 U.S. at 325. Beyond informing a suspect that he is under arrest, no "bright line" exists in custody determinations and never has. No one factor is determinative and each factor must be assessed in light of the other factors present. Any individual factor in one fact pattern can contribute to a finding of custody, yet hold little weight in another. *Compare, e.g., State v. Murray*, 796 P.2d 849, 851 (Alaska Ct. App. 1990) (fact that suspect was questioned in a police car did not result in finding of custody) *with State v. Preston*, 411 A.2d 402, 405 (Me. 1980) (fact that suspect was questioned in a police car contributed to finding of custody). Whenever a formal arrest does not occur, a police officer is required to assess all of the objective circumstances and decide whether to advise the suspect of his rights. *Berkemer v. McCarty*, 468 U.S. 420 (1984). The "police and lower courts...occasionally have difficulty in deciding exactly when a suspect has been taken into custody." *Id.* at 441. If the officer miscalculates, the evidentiary loss of the suspect's statements has been deemed an acceptable cost for the benefits that *Miranda* provides. *Dickerson v. United States*, 530 U.S. 428, 444 (2000).

The State and its *amici* assert that youth, unlike any other objective circumstance, would necessarily have to be assessed from the subjective perspective of the individual juvenile involved. No explanation is provided as to why that necessarily must be so. This bald assertion would equally suggest that an adult suspect's subjective determination that he was in custody must be taken into account, a proposition expressly rejected by this Court in *Berkemer* and *Stansbury*. An objective analysis does not inquire into the perceptions of the individual suspect, but the likely

understanding of the reasonable person in the suspect's position. *Berkemer*, 468 U.S. at 442. A different analysis is not warranted in order to gauge the impact of youth than to gauge the impact of any objective circumstance that affects the reasonable person's understanding.

All objective circumstances examined in a custody analysis draw meaning from sources extrinsic to the suspect's actual subjective feelings. A suspect's youth likewise has meaning and relevance to the custody analysis based on non-subjective sources, including community experience, common sense, and scientific data. (*Cf.* Restatement Second of Torts, §283A Comment b (1965) (the inclusion of age in assessing a reasonably prudent person "arises out of the public interest in [children's] welfare and protection, together with the fact that there is a wide basis of community experience upon which it is possible, as a practical matter, to determine what is expected of them.") The "experience of mankind, as well as the long history of the law, recogniz[es] that there *are* differences [between children and adults] which must be accommodated in determining the rights and duties of children as compared with those of adults." *Goss v. Lopez*, 419 U.S. 565, 590 (1975) (Powell, J., dissenting), *quoted in Thompson v. Oklahoma*, 487 U.S. 815, 823 (1988) (emphasis in original). Indeed, "[t]he differences between juvenile and adult offenders are too marked and well understood" to be ignored, *Roper v. Simmons*, 543 U.S. 551, 572 (2005), and go well beyond the psychological differences to which the State and its *amici* confine their arguments.

Common sense and community experience inform police officers and courts of the significance, or lack

thereof, of every objective circumstance as understood from the perspective of the reasonable person, such as whether the door to the interrogation room is open, shut, or locked. Likewise, common sense, community experience, and social, behavioral, and medical science informs interactions between juveniles and law enforcement. Police have already anticipated the "frailty" and factored the objective circumstance of youth into their investigations. Police officers are trained how to initiate and conduct interrogations of children in ways that common sense, community experience, and science document to be effective in "subjugat[ing] the individual to the will of his examiner." *Miranda v. Arizona*, 384 U.S. 436, 457 (1966).[1] Not telling a child that he is free to leave or failing to advise that he is free not to answer questions, for example, is an effective custodial technique precisely because common understanding informs us that children occupy an inferior social status to adults, are generally more deferential to authority figures than adults, and have been taught to answer questions posed by adults. Children take so seriously the lesson that they must answer that they are even willing to answer falsely, as the alarming rate of false confessions by juveniles demonstrates. Robert Weinstock, M.D., and Christopher Thompson, M.D., *Commentary:*

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1. For example, the International Association of Chiefs of Police, in conjunction with the United State Department of Justice, Office of Juvenile Justice and Delinquency Prevention, and Office of Justice Programs, sponsored a three-day training program on 31 January-2 February 2011 for law enforcement and school officials in "criminal investigation skills, tactics, and procedures necessary to effectively interview and interrogate juveniles/youth." *See* http://www.theiacp.org/About/WhatsNew?id=1383&v=1 ("IACP No Cost Training! Juvenile Interview and Interrogation Techniques, Phoenix, AZ.")

Ethics-Related Implications and Neurobiological Correlates of False Confessions in Juveniles, 37 Journal of the American Academy of Psychiatry and the Law 344, 346-347 (2009).

Considering age in the custody analysis was not foreclosed by *Miranda* itself, as the State asserted. (Resp. Brief, 28) Rather, this Court cautioned that law enforcement and courts could not excuse a failure to warn premised on supposition that the suspect, based on factors such as age, already knew what his rights were. 384 U.S. at 468-469. Nor would considering age insert a new consideration into the custody or interrogation context, since, as a practical matter, it has long been a law enforcement consideration. Police officers are taught that effective interrogation is based on knowing beforehand personal background information about the suspect, including the suspect's age. Reid et al., *Criminal Interrogation and Confessions*, 20 (4th ed. 2004). They are taught "themes specifically applicable to juveniles...." *Id.* at 301. An obligation to ascertain age often independently derives from state or federal statute. *E.g.*, N.C. Gen. Stat. §7B-2101 (2010). If the case is assigned to a juvenile investigator, the fact that the suspect is a minor has already been determined. That a suspect is a child is often obvious from his or her appearance, from the location chosen for the interrogation, or from interaction with parents. Since police officers utilize a suspect's youth in such contexts as selection of the site of the interrogation, creation of the isolated coercive atmosphere, and selection of the themes of interrogation, excluding age from the calculus makes no sense.

Although the State and its *amici* warn that floodgates will open if youth is considered in the custody analysis, such has not proven to be the case in the multitude of states which have long considered age. Counsel has been unable to locate any cases in jurisdictions that have long weighed age that expand the analysis to include the factors the State predicts will be included. None of the suggested factors identify a comparable cognizable segment of society who share the unique attributes of children or who are subject to physical restraints which cannot be placed on free adults. Nor has the fact that some courts have broken down the analysis into age-specific inquiries (*e.g.*, the "reasonable thirteen-year-old") proven unworkable in those jurisdictions, as such standards have been in place for decades and not abandoned in favor of a different standard.

J.D.B.'s juvenile status was evident the moment this investigation began. Officer Ennis' report recounted that he stopped two juveniles peeping into a residence. (J.A. 107a) The case was assigned to a juvenile investigator. (J.A. 127a) After reading the police report, the first action Investigator DiCostanzo took was to show Officer Ennis the Smith Middle School yearbook in order to obtain an identification. (J.A. 107a) Officer Ennis' identification of J.D.B. from the yearbook confirmed that the suspect was a juvenile. (J.A. 107a)

With the investigation having immediately focused upon a child, state law forbade Investigator DiCostanzo from conducting a custodial interrogation of J.D.B. in the absence of a parent, guardian, custodian, or attorney and required, if an attorney was not present, that J.D.B. and his parent, guardian, or custodian be advised of his

rights. N.C. Gen. Stat. §7B-2101(b). The Chapel Hill Police Department policy in force when J.D.B. was interrogated further recommended that a *Miranda* rights waiver be obtained whenever a juvenile was interrogated and that, if no written waiver was obtained, the interrogating officer advise the juvenile *before* commencing interrogation that he was not under arrest and was free to leave any time. *In re J.D.B.*, 363 N.C. 664, 676, 686 S.E.2d 135, 142 (2009).

Investigator DiCostanzo, however, made no effort to contact J.D.B.'s legal guardian. (J.A. 137a) He did not go to J.D.B.'s home. Instead, Investigator DiCostanzo decided to interrogate J.D.B. at school. (J.A. 108a-109a) He did not call J.D.B.'s guardian before having J.D.B. pulled out of class. (J.A. 124a)

No location, not even a station house, is coercive *per se*. *Beheler*, 463 U.S. at 1125. For a child, however, a school is "a naturally coercive environment." *State v. D.R.*, 84 Wn. App. 832, 838, 930 P.2d 350, 353 (Ct. App. 1997). Though adults retain freedom of movement in the workplace and would unreasonably conclude they were in custody if questioned at work about a non-work-related matter, *United States v. Crossley*, 224 F.3d 847, 862 (6th Cir. 2000), such an analogy does not ring true in the case of a child at school. Children are legally required to be at school during school hours. N.C. Gen. Stat. §115C-378 (2010). By Smith Middle School policy, children are required to obey all directives of adults.

Having selected an environment which gave him a unique tactical advantage by virtue of J.D.B.'s youth, Investigator DiCostanzo did not release J.D.B. after J.D.B. answered the initial round of questions. Without

having informed J.D.B. that he was free to leave or free to decline to answer, Investigator DiCostanzo told J.D.B. that he needed "to help [him]self by making it right." (J.A. 112a) The import of not being told that he was free to leave and not being told he was free to refuse to answer questions is again age-related.

> An interview that would not be 'compelling' for an adult might nonetheless frighten a child into believing that he or she was required to answer an officer's questions. Accordingly, special precautions should be taken to ensure that children understand that they are not required to stay or answer questions asked of them by a police officer.

In re Loredo, 125 Ore. App. 390, 865 P.2d 1312 (Ct. App. 1993) (custody not found in school interrogation as officer at outset advised child that he was not under arrest, was free to leave, and was free not to answer questions and interview conducted without presence of other authority figures).

Contrary to the State's and its *amici's* positions, however, consideration of youth is not confined simply to the school setting, but to every law enforcement-juvenile encounter. Whether police question a juvenile on the street, *In re Robert H.*, 194 A.D.2d 790, 599 N.Y.S.2d 621 (1993), at the station house, *People v. T.C.*, 898 P.2d 20 (Colo. 1995), inside the juvenile's home, *Lee v. State*, 988 So.2d 52 (Fla. Ct. App. 2008), outside the home, *People v. Howard*, 92 P.3d 445 (Colo. 2004), or other locale, age, like any objective circumstance, is a factor. That custody has not invariably been found demonstrates that it has

not become the determinative factor, but merely one circumstance considered in light of all circumstances present. *Miranda* warnings are not required simply because it seems the fair tack to take. *See United States v. Macklin*, 900 F.2d 948, 951 (6th Cir. 1990) (law enforcement not required to *Mirandize* mildly mentally retarded suspects in the absence of any indicia of custody); *In re Appeal in Maricopa County Juvenile Action*, 174 Ariz. 599, 601, 852 P.2d 414, 416 (Ct. App. 1993) (warnings not required if juvenile not in custody). If police restrict freedom of movement to the degree associated with an arrest, *Miranda* warnings must be given.

The State and its *amici* urge the Court to strip juveniles of Fifth Amendment protections by relegating age to the "vagaries of the traditional voluntariness test." *Michigan v. Mosley*, 423 U.S. 96, 113 (1975) (Brennan, J., dissenting).

> In *Miranda*, the Court noted the reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession, 384 U.S. at 457, a risk that the Court found unacceptably great when the confession is offered in the case in chief to prove guilt. The Court therefore concluded that something more than the totality test was necessary.

Dickerson, 530 U.S. at 442. *Miranda* established that "the privilege against compulsory self-incrimination," not due process, stands "as the principal protection for a person facing police interrogation." *Michigan v. Tucker*, 417 U.S. 433, 441-442 (1974). The State seeks to turn back the clock

by returning to a test that proved even "more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner." *Dickerson*, 530 U.S. at 444. *Accord New York v. Quarles*, 467 U.S. 649, 683 (1984) (O'Connor, J., dissenting) (voluntariness has proven an "exceedingly difficult" test for courts to apply); *Tucker*, 417 U.S. at 442-443 (*Miranda* offered "a more comprehensive and less subjective protection" than the due process test). It makes that request in the absence of any data that would cause this Court to reconsider its assessment "about the nature of juveniles." *Graham v. Florida*, 130 S.Ct. 2011, 2026 (2010).

Relying solely on voluntariness creates an unacceptable risk that a person would not be "accorded his privilege under the Fifth Amendment...not to be compelled to incriminate himself." *Miranda*, 384 U.S. at 439. Since children possess Fifth Amendment rights, *In re Gault*, 387 U.S. 1 (1967), they are constitutionally due protective measures to ensure that their rights are effectuated. *Dickerson*, 530 U.S. at 438. The availability of only a voluntariness inquiry does not provide that protection, since youth can be a relevant factor contributing to a finding of custody.

The State asks this Court to allow law enforcement to continue to take advantage of the unique and long-recognized susceptibilities of minors to create custodial situations without doing the one thing -- advising minors of their rights -- designed to give "the *defendant* the power to exert some control over the course of the interrogation." *Moran v. Burbine*, 475 U.S. 412, 426 (1986) (emphasis in original). This the Court should not do.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of North Carolina should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

J.D.B., PETITIONER

v.

STATE OF NORTH CAROLINA

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a juvenile's age is a factor in determining whether he is "in custody" for purposes of *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether the age of a juvenile is a factor in determining whether he is "in custody" for purposes of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Although the States adjudicate most violations of law committed by juveniles, the Department of Justice also initiates proceedings against juveniles under the Federal Juvenile Delinquency Act, 18 U.S.C. 5031 *et seq.* The Act authorizes the Attorney General in certain circumstances to bring delinquency proceedings against juveniles and to proceed against some juveniles as adults. 18 U.S.C. 5032. In addition, every year, federal agents interview suspects who are known to be (or are later discovered to be) juveniles. The United States has an interest in introducing into evidence voluntary,

noncustodial statements that are reliable evidence of guilt, regardless of whether the federal agents or state officers who take the statements have correctly assessed the age of the interviewee and correctly determined the degree (if any) to which that characteristic might render the interviewee more likely than a similarly situated adult to believe himself to be in custody.

STATEMENT

Following a conditional admission of guilt in the Orange County District Court, petitioner was adjudicated a delinquent juvenile, based on breaking and entering and larceny. J.A. 78a-79a. The trial court placed petitioner on 12 months of probation, with associated conditions, and ordered him to pay approximately $500 in restitution. J.A. 79a. The North Carolina Court of Appeals (J.A. 48a-73a) and the Supreme Court of North Carolina (J.A. 6a-47a) affirmed.

1. On September 24, 2005, two homes in Chapel Hill, North Carolina, were burglarized and various items were stolen, including jewelry and a digital camera. J.A. 97a. Petitioner, a 13-year-old special-education student, was identified as a possible suspect. J.A. 97a-98a, 107a, 122a. Petitioner had been seen behind a residence in the same neighborhood on the day of the break-ins and had been interviewed at that time by a local police officer. *Ibid.* The police later learned that the stolen camera had been recovered at petitioner's middle school and that petitioner had been seen in possession of it. J.A. 98a-99a, 107a-108a.

Investigator DiCostanzo, a juvenile investigator from the local police force, went to petitioner's school to interview him. J.A. 98a. Investigator DiCostanzo was aware,

when he did so, of petitioner's age. J.A. 124a. Petitioner was escorted from his classroom to a school conference room by a "school resource officer," a uniformed police officer assigned to the school. J.A. 98a, 109a, 144a; Br. in Opp. 3 & n.1.

After petitioner arrived, the door to the conference room was closed, but not locked. J.A. 98a. Joining Investigator DiCostanzo in the conference room were the school resource officer, an assistant principal, and a school intern. J.A. 98a; 108a. Investigator DiCostanzo identified himself to petitioner and began the interview with small talk about sports and petitioner's family life. J.A. 110a, 114a, 127a. He asked if petitioner would agree to answer questions about recent break-ins. J.A. 98a, 127a. Petitioner consented. J.A. 98a.

Petitioner initially denied any criminal activity, claiming that he had been in the neighborhood looking for work mowing lawns. J.A. 99a. The assistant principal encouraged petitioner to "do the right thing because the truth always comes out in the end," and Investigator DiCostanzo confronted petitioner with the recovery of the stolen camera. J.A. 99a, 111a-112a.

Petitioner responded by asking whether he would still be in trouble if he returned the "stuff." J.A. 99a, 112a. Investigator DiCostanzo told petitioner that returning the items would be helpful, but that "this thing is going to court." *Ibid.* Investigator DiCostanzo also told petitioner that, if he felt that petitioner was going to commit more break-ins, he "would have to look at getting a secure custody order." *Ibid.* Investigator DiCostanzo explained that a secure custody order would require petitioner to be placed in juvenile detention before appearing in court. J.A. 112a.

Investigator DiCostanzo advised petitioner that "you don't have to speak to me; you don't have to talk to me; if you want to get up and leave, you can do so" but that he "hoped that [petitioner] would listen to what [he] had to say." J.A. 99a, 112a. Investigator DiCostanzo then asked whether petitioner understood that he was not under arrest and was under no obligation to talk. *Ibid.* Petitioner "indicated by nodding 'yes' that he understood that he did not have to talk * * * and that he was free to leave." J.A. 99a; see J.A. 120a-121a.

Petitioner provided details concerning his involvement in the break-ins. J.A. 99a, 112a-113a. Petitioner also wrote out a short statement admitting his participation and stating that he would get the other juvenile who was involved "to give the jewelry back." J.A. 100a, 113a. When the bell rang signaling the end of the school day, petitioner left and went home on his regular school bus. J.A. 100a. The full interview lasted from 30 to 45 minutes. *Ibid.*

The investigation continued that afternoon. The police obtained a search warrant for petitioner's residence. J.A. 100a, 117a. After petitioner arrived home from school, he retrieved jewelry for the police from inside the house, and he led Investigator DiCostanzo to additional stolen jewelry that he had hidden on the roof of a nearby gas station. J.A. 100a, 118a-119a. Petitioner also volunteered to help retrieve stolen items from his accomplice, but no one came to the door when he and Investigator DiConstanzo went to the accomplice's residence. J.A. 119a-120a.

2. a. Two juvenile petitions were filed against petitioner, each alleging one count of breaking and entering and one count of larceny. J.A. 6a. Petitioner moved to

suppress all of the statements he had made, along with the stolen items the police had recovered as a result of his statements. J.A. 88a-89a, 104a. Petitioner argued that he had been "in custody" when he made the statements and that the police had failed to follow the proper procedures for a custodial interrogation: he had not received pre-interview warnings, as required by *Miranda* v. *Arizona*, 384 U.S. 436, 444-445 (1966), and no parent or guardian had been present, as required by N.C. Gen. Stat. § 7B-2101. J.A. 88a-89a, 104a; see N.C. Gen. Stat. § 7B-2101 (2005) (special procedures for custodial questioning of juveniles, including requirement that "admission or confession" of in-custody juvenile under 14 years of age be excluded from evidence unless "parent, guardian, custodian, or attorney" was present). Petitioner argued in the alternative that, even if he had not been in custody, he had been coerced into making the statements involuntarily. J.A. 104a.

After a hearing at which both petitioner and Investigator DiCostanzo testified, the trial court orally denied petitioner's suppression motion. J.A. 155a. The trial court concluded that petitioner had not been in custody when he talked to the police and that petitioner "clearly" had the "mental capacity * * * to understand" concepts relevant to the questioning. *Ibid.*

Petitioner, while continuing to object to the trial court's suppression ruling, admitted the allegations against him in the juvenile petitions. J.A. 6a-7a. The trial court entered an order adjudicating petitioner a delinquent. J.A. 7a.

b. Petitioner appealed, and the state court of appeals remanded for formalized findings of fact. J.A. 85a. The trial court subsequently issued a written suppres-

sion order, with findings of fact and conclusions of law, retroactively dated back to the suppression hearing. J.A. 97a-102a. The trial court concluded, with respect to the interview at his school, that petitioner "was not in custody when he was brought to the conference room"; that petitioner "was informed that he was free to leave and that he did not have to answer any questions, but chose to stay and volunteer more information"; and that "[b]ased on the totality of the circumstances, all statements made by [petitioner] and actions taken by [petitioner] in the presence of the law enforcement officers were voluntary." J.A. 101a-102a.

c. Petitioner renewed his appeal, contesting the trial court's determination that he had not been in custody during the questioning. J.A. 48a-73a. The court of appeals affirmed, concluding that a reasonable person in petitioner's position "would not have believed himself to be in custody or deprived of his freedom of action in some significant way" during petitioner's interactions with the police. J.A. 59a. The court rejected, as a factual matter, the contention "that Investigator DiCostanzo threatened [petitioner] with a secure custody order" during the interview at petitioner's school, noting that "the trial court did not make any finding of fact that [petitioner] was threatened." J.A. 57a. The court also rejected, as a legal matter, the contention that petitioner's "mental capacity and age" were "determinative" of the custody inquiry, noting that the custody inquiry is an "objective test" that examines "whether a reasonable person in the individual's position would have believed himself to be in custody or deprived of his freedom of action in some significant way." J.A. 58a.

One judge concurred in a separate opinion "to reiterate that the test for determining whether a juvenile is in custody thereby warranting a *Miranda* warning is an objective test to be applied on a case-by-case basis based on the totality of the circumstances." J.A. 61a. Another judge dissented, stating, among other things, that "the fact that [petitioner] was a middle school aged child is certainly among the circumstances relevant to 'whether a reasonable person in [his] position, under the totality of the circumstances, would have believed that he was under arrest or was restrained in his movement to the degree associated with a formal arrest.'" J.A. 65a (citation omitted).

d. The state supreme court affirmed, finding an absence of "sufficient 'indicia of formal arrest' to justify a conclusion that" petitioner was in custody. J.A. 16a (citation omitted); see J.A. 6a-47a. As to the in-school interview, the court reasoned that petitioner had failed to show sufficient additional restraints, beyond the "typical restrictions of the school setting," to establish custody. J.A. 14a-15a. Among other things, there was "no indication in the trial court's findings that [petitioner] was restrained in any way or that anyone stood guard at the conference room door," and Investigator DiCostanzo had indicated that petitioner was not required to answer questions and "began his questions only after [petitioner] said he was willing to answer." J.A. 15a.

The court rejected petitioner's argument that "the inquiry into whether he was in custody should take into consideration [his] age and his status as a special education student." J.A. 17a. The court reasoned that "subjective mental characteristics are not relevant regarding whether 'a *reasonable* person' would believe he had been

placed under the equivalent of a formal arrest." J.A. 18a (citations omitted).

There were two dissenting opinions. One justice would have held, as a matter of state law, that Section 7B-2101 requires consideration of age in assessing whether a juvenile was in custody and that petitioner had satisfied that state-law custody test. J.A. 19a-34a. Two other justices believed it appropriate to consider petitioner's age and status as a middle-school student as part of the *Miranda* custody analysis as well and would have held that Investigator DiCostanzo's questioning of petitioner violated both *Miranda* and Section 7B-2101. J.A. 34a-47a.

SUMMARY OF ARGUMENT

In determining whether a suspect is "in custody" under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), courts should examine objective restraints surrounding a suspect's questioning from the vantage point of a reasonable person, rather than seek to tailor the inquiry to the age and the assumed resulting psychological vulnerabilities of the person questioned. The Court has rejected similar factors that would blur the custody inquiry, and the same conclusion is warranted here.

Under the Due Process Clause, courts have examined the totality of the circumstances, including both the objective circumstances of the questioning and the psychological make-up of the suspect, to determine the voluntariness of a suspect's statements. Experience revealed that application of that fact-sensitive due process test risked the admission of an involuntary custodial confession. In order to counteract that risk, *Miranda* adopted an additional procedural rule when a suspect is

questioned "in custody." In that setting, the Court established a set of procedures (warning the suspect of his rights and obtaining a waiver) that police must generally follow in order to secure the admission of statements in the government's case in chief. One of the principal advantages of *Miranda* is to provide police and courts with clear guidance about how questioning must be conducted in order for statements obtained to be admissible.

The Court has emphasized that an objective test for "custody"—the trigger for the *Miranda* procedures—plays a critical role in maintaining the clarity of the *Miranda* rule. See, *e.g.*, *Yarborough* v. *Alvarado*, 541 U.S. 652, 667 (2004). The Court has defined "custody" as "a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest" and instructed police and courts that they can identify such a situation by (1) examining "the circumstances surrounding the interrogation" and (2) assessing whether a "reasonable person" in those circumstances would have felt able "to terminate the interrogation and leave." *Thompson* v. *Keohane*, 516 U.S. 99, 112 (1995) (internal quotation marks and citation omitted). In applying the custody test, this Court has focused exclusively on such observable factors as the length and location of police questioning and has excluded such psychological factors as a suspect's intoxication, emotional distress, or prior experience with police.

Consideration of a suspect's age—as an indicium of the suspect's psychological vulnerability—would, for the first time in the 45 years of post-*Miranda* jurisprudence, blur the custody line by mandating consideration of a psychological factor. "Age"—meant as shorthand for a correlation between youth and "susceptib[ility] to

the coercive techniques of police interrogation" (Pet. Br. 9)—is materially different from the sorts of "objective" circumstances that the Court has taken into consideration in past custody determinations. Age, in the chronological sense, is an objective circumstance. But its significance in gauging *how* a suspect would perceive or react to a given set of restraints is not. Rather, the vulnerability that may accompany youth is an individual psychological characteristic of the sort that this Court has, for sound reason, kept out of the custody analysis.

The Court has stated that "the simplicity and clarity of the holding of *Miranda*" are not to be compromised "[a]bsent a compelling justification." *Berkemer* v. *McCarty*, 468 U.S. 420, 432 (1984). The inclusion of age as a factor would significantly complicate *Miranda* custody determinations by requiring officers to ascertain the age of suspects (which is not readily discerned, and which suspects may not disclose) and then make difficult judgments about how that factor might affect the suspect's perception of events. Courts reviewing officers' actions would likewise lack determinable standards for factoring age into the custody test. Consideration of age would therefore likely generate inconsistent results and deprive officers in the field of useful direction. And incorporation of age into the custody inquiry would logically open the door to requiring consideration of a variety of other psychological characteristics, such as mental disabilities or cultural predispositions, effectively collapsing the *Miranda* custody inquiry back into the due process voluntariness inquiry.

There is no need to embark upon such a course. Additional protections against coerced confessions, such as the due process voluntariness test and various statutes,

already take age (and other psychological factors) adequately into account. Moreover, the existing custody test already provides ample incentives for police to provide *Miranda* warnings whenever officers believe it reasonably likely that a suspect is in custody. The lower court therefore correctly concluded that petitioner's age was not a relevant factor in determining whether he was in custody.

ARGUMENT

AGE IS NOT A RELEVANT CONSIDERATION IN DETERMINING WHETHER A JUVENILE IS "IN CUSTODY" UNDER *MIRANDA*

Under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), statements taken in custodial interrogation must be preceded by specified warnings in order to be admissible in the government's case in chief. Specifically, the suspect must "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 444; see also *Florida* v. *Powell*, 130 S. Ct. 1195 (2010). If a suspect makes a statement during custodial interrogation, the burden is on the government to show, as a "prerequisite[] to the admissibility of [the] statement," that the defendant "voluntarily, knowingly and intelligently" waived his rights. *Miranda*, 384 U.S. at 444, 475-476.

Those procedures are a prerequisite to admissibility, "however, 'only where there has been such a restriction on a person's freedom as to render him "in custody."'" *Stansbury* v. *California*, 511 U.S. 318, 322 (1994) (per curiam) (quoting *Oregon* v. *Mathiason*, 429 U.S. 492, 495

(1977) (per curiam)). As petitioner acknowledges (Pet. Br. 8-9), that custody determination involves "an objective test." *Yarborough* v. *Alvarado*, 541 U.S. 652, 667 (2004).

> Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.

Id. at 663 (quoting *Thompson* v. *Keohane*, 516 U.S. 99, 112 (1995)).

The objective inquiry for custody does not include consideration of the psychological effect that a particular suspect's age might have on how the suspect would evaluate the circumstances in which he finds himself. Inclusion of age would transform the custody inquiry, render it complex to administer, and serve no necessary purpose.

A. The *Miranda* Custody Test Is An Objective Test Designed To Give Clear Guidelines To Police And Courts

As the Court "ha[s] stressed on numerous occasions, '[o]ne of the principal advantages' of *Miranda* is the ease and clarity of its application." *Moran* v. *Burbine*, 475 U.S. 412, 425 (1986) (quoting *Berkemer* v. *McCarty*, 468 U.S. 420, 430 (1984)). *Miranda*, the Court has said, has the "important virtue of informing police and prose-

cutors with specificity as to how a pretrial questioning of a suspect must be conducted" in order to result in admissible statements. *Colorado* v. *Spring*, 479 U.S. 564, 577 n.9 (1987) (internal quotation marks and citation omitted); see, *e.g.*, *Missouri* v. *Seibert*, 542 U.S. 600, 622 (2004) (Kennedy, J., concurring in the judgment) ("*Miranda*'s clarity is one of its strengths."). The objective nature of the custody test is a critical component of *Miranda*'s clarity.

1. Before *Miranda*, this Court exclusively "evaluated the admissibility of a suspect's confession under a voluntariness test," whose "primar[y]" constitutional basis was the Due Process Clause. *Dickerson* v. *United States*, 530 U.S. 428, 433 (2000). Under that test, in order to determine whether a particular "defendant's will was overborne" during interrogation, *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226 (1973), a court must engage in "a weighing of the circumstances of pressure against the power of resistance of the person confessing," *Stein* v. *New York*, 346 U.S. 156, 185 (1953).

Accordingly, the due process test considers "both the characteristics of the accused and the details of the interrogation." *Schneckloth*, 412 U.S. at 226. Relevant factors to be considered in the voluntariness inquiry include "the crucial element of police coercion, the length of the interrogation, its location, [and] its continuity," as well as "the defendant's maturity, education, physical condition, and mental health." *Withrow* v. *Williams*, 507 U.S. 680, 693 (1993) (citations omitted). As petitioner observes (Pet. Br. 29), this Court has held that a defendant's age is among the factors considered in the due process voluntariness determination. See, *e.g.*, *Gallegos* v. *Colorado*, 370 U.S. 49, 54 (1962)

(14-year-old was "not equal to the police in knowledge and understanding of the consequences of the questions and * * * is unable to know how to protect his own interests"); *Haley* v. *Ohio*, 332 U.S. 596, 599 (1948) (plurality opinion) (when voluntariness of confession by a child is at issue, "special care in scrutinizing the record must be used").

Miranda developed in significant part as a response to perceived difficulties in applying the due process voluntariness test. The voluntariness test was considered difficult "for law enforcement officers to conform to, and for courts to apply in a consistent manner." *Dickerson*, 530 U.S. at 444. In addition, "the advent of modern custodial police interrogation brought with it an increased concern about confessions obtained by coercion," *id.* at 434–435, and "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements," *id.* at 435. Accordingly, the Court determined that "reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession, a risk that the Court found unacceptably great when the confession is offered in the case in chief to prove guilt." *Id.* at 442 (citation omitted).

2. *Miranda* simplifies and clarifies the landscape by providing "a set of prophylactic measures" to govern the admissibility of statements made during custodial interrogations. *Maryland* v. *Shatzer*, 130 S. Ct. 1213, 1219 (2010). The "gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative

evidence even though the confession might be voluntary under traditional Fifth Amendment analysis." *Fare v. Michael C.*, 442 U.S. 707, 718 (1979).

In identifying custody as the point at which additional protections become appropriate, the Court observed that it is "when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way" that "our adversary system of criminal proceedings commences," and "the safeguards to be erected about the privilege" against compelled self-incrimination "must come into play." *Miranda*, 384 U.S. at 477. The Court's decisions "make clear" that identification of this procedurally significant tipping point "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury*, 511 U.S. at 323.

The "ultimate inquiry" is whether there was a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest," an inquiry that depends on (1) "the circumstances surrounding the interrogation" and (2) whether a "reasonable person" in those circumstances would "have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson*, 516 U.S. at 112 (internal quotation marks and citation omitted).[1] In determining whether "indicia of arrest [are] present," *California v. Beheler*, 463 U.S.

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[1] The Court has recognized that "the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody." *Shatzer*, 130 S. Ct. at 1224. That is, *Miranda* applies only in the situations that generate the concerns that the decision addressed, not in every situation in which freedom of movement is significantly restrained. *Ibid.*

1121, 1123 (1983) (per curiam), the Court has looked to such factors as the location of the questioning, the use of force or restraints, the length of the interview, and the number of officers present. See, *e.g.*, *Berkemer*, 468 U.S. at 437-438 (considering public setting, length, and presence of only one or two officers in holding traffic-stop questioning noncustodial); *New York* v. *Quarles*, 467 U.S. 649, 655 (1984) (considering that suspect "was surrounded by at least four police officers and was handcuffed" in holding questioning custodial); *Mathiason*, 429 U.S. at 495 (considering absence of restraint on freedom of movement in holding police-station questioning noncustodial); *Beckwith* v. *United States*, 425 U.S. 341, 342-344 (1976) (considering location at suspect's home in holding questioning noncustodial).

The Court has stressed that the objective nature of the test "furthers 'the clarity of *Miranda*'s rule,' ensuring that the police do not need 'to make guesses as to the circumstances at issue before deciding how they may interrogate the suspect.'" *Alvarado*, 541 U.S. at 667 (brackets and citation omitted). In *Berkemer* v. *McCarty*, *supra*, this Court supported its adoption of the "reasonable person" standard for custody determinations by citing the seminal case of *People* v. *P.*, 233 N.E.2d 255, 256, 260 (N.Y. 1967), in which New York's highest court applied an objective reasonable-man standard in holding that a 16-year-old suspect was not in custody for *Miranda* purposes when he was interrogated by a police officer outside his home. This Court cited *People* v. *P.* for the proposition that "an objective, reasonable-man test is appropriate because, unlike a subjective test, it * * * 'does [not] place upon the police the burden of anticipating the frailties or idiosyncracies of every person whom they question.'" *Berk-*

ener, 468 U.S. at 442 n.35; see *Alvarado*, 541 U.S. at 662. Commentators and courts have likewise noted the value of employing an objective standard that does not consider the characteristics of individual suspects or officers, because of the clearer guidance it provides police. See, *e.g.*, Geoffrey R. Stone, *The* Miranda *Doctrine in the Burger Court*, 1977 Sup. Ct. Rev. 99, 153 (noting that objective approach "has been widely endorsed by courts and commentators alike" because it "eliminates the difficulties of determining states of mind, and does not hold the police responsible for the idiosyncracies of particular defendants"); *United States* v. *Macklin*, 900 F.2d 948, 951 (6th Cir.) (same), cert. denied, 498 U.S. 840 (1990); *United States* v. *Phillips*, 812 F.2d 1355, 1359-1360 (11th Cir. 1987) (same).

B. The Psychological Characteristics Of Individual Suspects, Including Age-Related Characteristics, Are Not Relevant To The *Miranda* Custody Determination

1. This Court has consistently rejected claims that the individual psychological characteristics of those questioned must be considered in determining whether they were "in custody" for *Miranda* purposes. For example, the defendant in *California* v. *Beheler*, *supra*, had voluntarily agreed to accompany police to the station house to answer questions about a shooting he had reported. 463 U.S. 1122. Although he was told he was free to leave, he was not given *Miranda* warnings and made a statement that was introduced against him at his trial for first-degree murder. *Ibid.* The California Court of Appeal reversed his conviction, holding that the interview with police constituted custodial questioning. *Id.* at 1122-1123. In so holding, the state court considered various personal characteristics of the defendant at

the time of the interview that, the court believed, made him more susceptible to coercion, such as the fact that he "had been drinking earlier in the day," "was emotionally distraught," and "was a parolee who knew that 'it was incumbent upon him to cooperate with police.'" *Id.* at 1124-1125; see Pet. App. 24-26, *Beheler*, *supra* (No. 82-1666).

This Court reversed, specifically rejecting the claim that the defendant was "'coerced' because he was unaware of the consequences of his participation" in the interview. *Beheler*, 463 U.S. at 1125 n.3. The Court observed that the defendant had "cite[d] no authority to support his contention that his lack of awareness transformed the situation into a custodial one." *Ibid.* As the Court later explained, *Beheler* was "indistinguishable" from *Oregon* v. *Mathiason*, *supra*, which had involved similar police conduct but had not involved such psychological factors. *Alvarado*, 541 U.S. at 662; see *Beheler*, 463 U.S. at 1124-1125; *Mathiason*, 429 U.S. at 493-494.

Similarly, in *Yarborough* v. *Alvarado*, *supra*, a 17-year-old defendant with no prior criminal record came to the police station with his parents. 541 U.S. at 656, 660. He did not receive *Miranda* warnings, and, during a two-hour interview in a small room, made incriminating statements that were later introduced against him at trial. *Id.* at 656-659. The state courts affirmed his conviction for second-degree murder, concluding that he had not been in custody when he made the statements. *Id.* at 659. A federal court of appeals, however, determined that he was entitled to a writ of habeas corpus because the state-court adjudication had "resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C.

2254(d)(1); see 541 U.S. 659-660. In the court of appeals' view, "age and experience [with law enforcement] must be a factor in the *Miranda* custody inquiry," and the state courts' custody conclusion was unreasonable in light of those factors. *Id.* at 660.

This Court reversed. *Alvarado*, 541 U.S. at 655. It explained that "[t]here is an important conceptual difference between the *Miranda* custody test and the line of cases from other contexts considering age and experience," namely, that the custody test "is an objective test." *Id.* at 667. The Court observed that its "opinions applying the *Miranda* custody test have not mentioned the suspect's age, much less mandated its consideration" and that the "only indications in the Court's opinions relevant to a suspect's experience with law enforcement have rejected reliance on such factors." *Id.* at 666-667. The Court held that experience with law enforcement was an improper factor in the *Miranda* custody test even "as a *de novo* matter," reasoning that police often "will not know a suspect's interrogation history"; that "the relationship between a suspect's past experiences and the likelihood a reasonable person with that experience would feel free to leave often will be speculative"; and that "[w]e do not ask police officers to consider these contingent psychological factors when deciding when suspects should be advised of their *Miranda* rights." *Id.* at 668. The Court additionally held that "failure to consider [a suspect's] age does not provide a proper basis for finding that the state court's decision was an unreasonable application of clearly established law." *Ibid.* The Court explained that, in granting habeas relief, the court of appeals had "ignored the argument that the custody inquiry states an objective rule designed to give clear guidance to the police, while con-

sideration of a suspect's individual characteristics—including [a suspect's] age—could be viewed as creating a subjective inquiry." *Ibid.*

The consistent objective focus of the *Miranda* custody inquiry is especially striking when compared alongside the variety of psychological factors held relevant to the due process voluntariness inquiry. This Court has recognized that many personal characteristics of the suspect—*e.g.*, lack of education, low intelligence, and poor physical condition—are relevant to voluntariness determinations because they bear on the suspect's ability to resist coercion or to appreciate the implications of his actions. See, *e.g.*, *Clewis* v. *Texas*, 386 U.S. 707, 712 (1967) (concern about adult suspect's faculties given "additional weight" because he "had only a fifth-grade education"); *Payne* v. *Arkansas*, 356 U.S. 560, 562 n.4, 567 (1958) (emphasizing that suspect was "mentally dull"); *Fikes* v. *Alabama*, 352 U.S. 191, 196, 198 (1957) (holding that pressure applied against suspect who was "weak of * * * mind" and of "low mentality" rendered statement involuntary); *Greenwald* v. *Wisconsin*, 390 U.S. 519, 520-521 (1968) (per curiam) (emphasizing that suspect did not have his blood-pressure medication); *Clewis*, 386 U.S. at 712 (noting that suspect's faculties were impaired by "sickness"). But in the 45 years since *Miranda*, this Court *never* has held any of those personal characteristics to be relevant in determining whether a person was subject to "the functional equivalent of formal arrest." *Berkemer*, 468 U.S. at 442.

2. This Court's precedents therefore provide no support for petitioner's suggestion (Pet. Br. 9) that "age" is the sort of "objective circumstance" that traditionally plays a role in the *Miranda* custody analysis. Although "age" is "objective" in the narrow sense that someone's

birthdate precisely determines how old he is, that is not the sense in which petitioner is employing the term here. Petitioner is instead using the term "age" as a stand-in for a set of age-correlated factors that may "render[] a child particularly susceptible to the coercive techniques of police interrogation." *Ibid.* As petitioner's own references (*e.g.*, Pet. Br. 19, 23) to "psychology," "brain science," "cognitive" studies, and the like confirm, "age" in that sense is a psychological factor akin to the ones that the Court has excluded from the custody test (drunkenness, emotional distress, experience with police) and unlike the sort of objective factors (*e.g.*, location, physical restraint, length of time) the Court has heretofore included.

Petitioner appears to suggest (Pet. Br. 20-21) that because courts in some contexts employ a "reasonable juvenile" test, age must therefore be considered an objective factor. But the Court rejected a similar suggestion in *Alvarado*. The court of appeals there "styled its inquiry as an objective test by considering what a 'reasonable 17-year-old, with no prior history of arrest or police interviews,' would perceive." 541 U.S. at 667. This Court nevertheless concluded that consideration of criminal history "turns too much on the suspect's subjective state of mind" to be included in the custody analysis and acknowledged that age "could be viewed as creating a subjective inquiry." *Id.* at 668-669. Framing consideration of age in putatively objective terms—*e.g.*, what a "reasonable 17-year-old" or a "reasonable 16-year old" would do—does not alter the inherently psychological nature of the inquiry.[2]

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[2] Petitioner's proposed "reasonable juvenile" test is also unlike "reasonable juvenile" tests in contexts such as tort law (Pet. Br. 21; cf.

One of petitioner's amici analogizes consideration of a suspect's age to consideration of a suspect's blindness or deafness. See Juvenile Law Ctr. Amicus Br. 23. This Court has never directly addressed whether or how such sensory disabilities would affect the *Miranda* custody test, but they present a different issue from psychological factors such as age. Sensory disabilities affect a suspect's acquisition of knowledge about the "circumstances surrounding [his] interrogation." *Thompson*, 516 U.S. at 112. They could potentially be addressed in an objective fashion by asking how a reasonable person, in a situation defined by the circumstances of which the disabled suspect reasonably had notice (*e.g.*, excluding sights or sounds), would feel. Psychological factors such as age, however, affect the suspect's mental analysis of the situation. There would be no way to account for them other than to transform the "reasonable person" test, *ibid.*, into something else, in an attempt to approximate the suspect's thought processes. This Court has consistently declined to transform the *Miranda* custody test in that way.

C. Expansion Of The *Miranda* Custody Test To Require Consideration Of Psychological Factors Correlated To Age Is Unwarranted

Because of the considerable advantages afforded by the clear guidance *Miranda* provides, this Court has

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Alvarado, 541 U.S. at 674 (Breyer, J., dissenting)) because it does not regulate the conduct of the juvenile himself, but instead regulates the conduct of officers who interact with the juvenile. A rule that requires officers to speculate about the impact of a juvenile's age on how the juvenile would perceive an otherwise noncustodial setting creates practical difficulties that are not present in rules whose purpose is to require juveniles themselves to act reasonably. See Section C.1, *infra*.

indicated it will not compromise "the simplicity and clarity of the holding of *Miranda*" "[a]bsent a compelling justification." *Berkemer*, 468 U.S. at 432. No compelling justification exists here, as the disadvantages of petitioner's rule greatly outweigh any advantages.

1. Consideration of age would undermine Miranda*'s purpose of providing clear guidelines for police and courts*

Petitioner's proposal would add significantly to the complexity of the *Miranda* custody determination. While it is not entirely clear from petitioner's brief, his "reasonable juvenile" test (Pet. Br. 20) presumably would require consideration of how a hypothetical "reasonable juvenile" of the suspect's particular age would perceive the circumstances. *See* ABA Amicus Br. 17-18; Ctr. on Wrongful Convictions of Youth Amicus Br. 28-29; Juvenile Law Ctr. Amicus Br. 30-31.[3] That test would introduce a number of practical difficulties that neither petitioner nor any of his amici identify an effective way to solve.

a. To begin with, police frequently will be unable to determine a subject's age if the subject is not carrying identification or lies about his age (for example, to avoid arrest for a curfew violation, unlawful possession of alcohol or cigarettes, or any other activity unlawful because of the suspect's age). Cf. *Alvarado*, 541 U.S. at 668 (excluding interrogation history from custody inquiry in

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[3] If petitioner is, in fact, departing from his amici on this issue, he fails to identify how "reasonable juvenile" would be defined, or why it would make sense (if age is to be considered in the first place) to treat older juveniles the same as younger ones. *See, e.g.*, Pet. Br. 20 (discussing studies distinguishing between juveniles under 16 and other juveniles).

part because "[i]n most cases, police officers will not know" it); *Berkemer*, 468 U.S. at 430 (excluding seriousness of crime from *Miranda* inquiry in part because "police often are unaware when they arrest a person whether he may have committed a misdemeanor or a felony"). Studies demonstrate that people often make good-faith mistakes about whether someone is a juvenile. See, *e.g.*, Paul Willner & Gavin Rowe, *Alcohol Servers' Estimates of Young People's Ages*, 8 Drugs: Education, Prevention & Policy 376, 379-381 (2001) (test subjects looking at photos misidentified 56% of 16-year-old girls, approximately 40% of 16-year-old boys, and 18% of 13-year-old girls as non-juveniles) (Willner & Rowe); Ray M. Merrill et al., *The Relationship of Perceived Age and Sales of Tobacco and Alcohol to Underage Customers*, 25 J. of Cmty. Health 401, 405-406 (2000) (Merrill) (test subjects wrong over 20% of the time in certain cases); see also *Alvarado*, 541 U.S. at 669 (O'Connor, J., concurring) ("It is difficult to expect police to recognize that a [nearly 18-year-old] suspect is a juvenile."). Assuming the officer recognizes the subject as a juvenile, pinpointing his precise age is an even more challenging task. Willner & Rowe 377 (test subjects significantly mis-estimated juveniles' ages); Merrill 405 tbl.1 (same).[4]

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[4] Although it may be relatively easy for an officer to determine the juvenile status (if not the exact age) of a very young juvenile, preadolescent crime is a rare occurrence that should not be the focus of the Court's consideration in this case. In 2008, over 99% of reported state and local juvenile arrests nationwide were of suspects ten or older, and nearly 94% were of suspects 13 or older. Federal Bureau of Investigation, U.S. Dep't of Justice, *Crime in the United States, 2008* (Sept. 2009), http://www2.fbi.gov/ucr/cius2008/data/table_38.html. There were no federal arrests of suspects under the age of 13 in fiscal year 2008. See Bureau of Justice Statistics, Federal Justice Statistics Resource Center, http://fjsrc.urban.org.

Petitioner points out (Pet. 26) that a suspect interviewed at his middle school will obviously be a juvenile. But middle schools are not the only place where interviews can occur. Investigations of crime by street gangs, for example, may frequently involve contact outside of school with potential juveniles whose age and juvenile status are not readily determinable. See, *e.g.*, Nat'l Gang Ctr., *National Youth Gang Survey Analysis: Demographics* (in 2006, approximately one-third of all gang members, and over 50% of gang members in certain areas, were juveniles), http://www.nationalgangcenter.gov/Survey-Analysis/Demographics#anchorage. Moreover, the middle school argument does not translate to high schools, where many students are non-juveniles. See U.S. Census Bureau, *School Enrollment—Social and Economic Characteristics of Students: October 2008* tbl.1, http://www.census.gov/population/socdemo/school/cps2008/tab01-01.xls (nearly 1.5 million students ages 18 or 19 were enrolled in high school in 2008).

Even if officers are able accurately to determine a subject's age, it "may be difficult for them to ascertain what bearing it has on the likelihood that the suspect would feel free to leave." *Alvarado*, 541 U.S. at 669 (O'Connor, J., concurring). While officers can rely on their own experience, and a considerable body of precedent, to evaluate how various objective factors (such as the length of an interview) affect the custody analysis, consideration of age would introduce a new dimension that would require reassessment of even previously well-settled scenarios to factor in the indeterminate perspectives of juveniles of different ages. Neither petitioner nor his amici offer a methodology by which a police officer can reliably assess how a "reasonable juve-

mle" of a particular age would view a specific set of circumstances, or how that view would differ from the view of a "reasonable juvenile" of a different age or the view of a "reasonable person." Studies indicating, for example, "that juveniles under the age of sixteen are significantly more likely to comply with adult authority" as a general matter (Pet. Br. 20) offer no concrete guidance to officers, untrained in juvenile psychology, who risk the loss of critical confession evidence unless they can make accurate, on-the-spot, case-specific custody determinations. Cf. *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 348 (2001) (rejecting rule that would require officers to know details of the penalty schemes for various offenses) (citing *Berkemer*, 468 U.S. at 431 n.13). As this Court has recognized, "[i]t would be unreasonable to expect the police to make guesses * * * before deciding how they may interrogate the suspect." *Berkemer*, 468 U.S. at 431.

b. Courts evaluating officers' conduct in hindsight will not have it any easier. Because an officer's own mindset is irrelevant to the custody test, *Stansbury*, 511 U.S. at 323, consideration of age in the custody test could not be limited to cases in which the officer was aware of the suspect's age. Nor, for that same reason, could the test take into account the officer's subjective knowledge or belief regarding the suspect's age. That leaves courts with two options. First, courts could consider a suspect's actual age in all cases, a practice that both would penalize officers for not knowing (or being able to discern) a suspect's youth and would confer a windfall on older-looking juveniles. Second, courts could attempt to determine in every case what the officer reasonably *should* have known about the suspect's age, thereby requiring courts to detour into fact-finding

about a reasonable officer's perceptions. Neither option is satisfactory. Cf. *Berkemer*, 468 U.S. at 432 (rejecting modification to custody test that would result in litigation that "would be time-consuming and disruptive of law enforcement").

Assuming courts were able to get past that threshold problem, they (like officers) would still face the further problem of the absence of concrete guidelines for assessing the degree to which a suspect's age might affect his belief that a specific set of circumstances constitutes custody. Unless suppression hearings are to become battles of the experts (which would by no means assure correct or consistent outcomes), age will simply be a thumb on the scales favoring the defendant. Cf. Jonathan S. Carter, *You're Only as "Free to Leave" as You Feel*, 88 N.C. L. Rev. 1389, 1408-1409 (2010). That result undermines the purposes of an area of law that must have "a view to * * * advancing uniform outcomes" in order to reliably guide officers' primary conduct. *Thompson*, 516 U.S. at 113 n.13; see *id.* at 114-115. Moreover, even if courts could achieve some uniformity in how they apply the custody test to defendants of different ages in different situations, "[n]either the police nor criminal defendants would benefit from" such an "elaborate set of rules, interlaced with exceptions and subtle distinctions." *Berkemer*, 468 U.S. at 432.

That some courts have adopted petitioner's rule (Pet. Br. 24-25) does not suggest that it is administrable. This Court has previously refused to modify the *Miranda* rule when doing so would "undermine" its clarity and introduce "doctrinal complexities," even when a number of lower courts had already adopted the modification at issue. *Berkemer*, 468 U.S. at 430-431; see *id.* at 427 n.7. Neither petitioner nor his amici identify how the lower

courts adopting his position have solved, or would solve, the problems discussed above, or, more fundamentally, how age could be introduced into the *Miranda* custody test without doing significant harm to its basic design.

2. No compelling reason justifies injecting age into the custody test

Petitioner and his amici suggest that, because studies show that youth generally correlates with increased susceptibility to interrogation, the existing legal protections against coerced confessions are inadequate unless age is factored into the *Miranda* custody test. *E.g.*, Pet. Br. 9. Without questioning the studies—which may illuminate other legal determinations—the argument is flawed in this context and fails to provide a "compelling justification" for expanding *Miranda* and inviting the doctrinal and practical difficulties just discussed. *Berkemer*, 468 U.S. at 432; see *Beheler*, 463 U.S. at 1124-1125 (declining to consider in the custody test personal characteristics that, in the lower court's view, rendered the suspect more susceptible to coercion).

Significantly, the argument does not admit of ready limitations. A wide variety of people—both adults and juveniles—have psychological traits that arguably make it more likely that they would consider any interaction with police to entail serious restriction on their freedom of movement. Individuals with low intelligence, people with mental infirmities, and people whose cultural background encourages compliance with police requests or causes them to view police with suspicion, for example, all might read into their interactions with police coercion that is not apparent from the objective circumstances. See, *e.g.*, *United States* v. *Salyers*, 160 F.3d 1152, 1159 (7th Cir. 1998) (rejecting claim that defendant's military

experience, which "trained [him] to obey orders from those in authority," should be considered in determining whether he was in custody for *Miranda* purposes); *Macklin*, 900 F.2d at 950-951 (rejecting claim that mental retardation rendered defendant "in custody" when she was interviewed by police in front of her house); *United States* v. *Chalan*, 812 F.2d 1302, 1307 (10th Cir. 1987) (rejecting claim of Native American that he was "in custody" for *Miranda* purposes because, by tribal custom, he could not refuse the request of tribal governor to answer FBI agents' questions about a crime), cert. denied, 488 U.S. 983 (1988). If psychological characteristics such as these are taken into account in making custody determinations, the threshold determination of *Miranda*'s applicability would soon become indistinguishable from the exhaustive due process voluntariness test from which *Miranda* evolved.[5]

Furthermore, petitioner and his amici largely overlook that the constitutional framework governing coerced confessions *already* takes age, and other psychological factors, into account. The Court has "never abandoned [its] due process jurisprudence, and thus contin-

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[5] Petitioner's attempt (*e.g.*, Pet. Br. 19, 26) to draw support for his argument from Eighth Amendment cases categorically prohibiting the imposition of certain punishments (the death penalty and life imprisonment without parole for nonhomicide crimes) against juveniles, see *Graham* v. *Florida*, 130 S. Ct. 2011 (2010); *Roper* v. *Simmons*, 543 U.S. 551 (2005), is misplaced. Even if analogies could be drawn between the Eighth Amendment and *Miranda*, the Court in *Graham* and *Roper* did the opposite of what petitioner requests here. Whereas those decisions engrafted easily administrable rules onto a context (sentencing) in which detailed individualized consideration would otherwise be the norm, *Graham*, 130 S. Ct. at 2030; *Roper*, 530 U.S. at 574, petitioner's approach would complicate an easily administrable rule (the custody test) by mandating consideration of individualized factors.

ue[s] to exclude confessions that were obtained involuntarily." *Dickerson*, 530 U.S. at 434. A juvenile defendant, like any other defendant, is free to argue that his statements were involuntary, irrespective of whether he was in custody when they were made. *Id.* at 444.[6] In evaluating an involuntariness claim, courts must take both objective and psychological factors, including age, into account. See pp. 13-14, *supra*. Courts also take age and other psychological factors into account in determining whether a juvenile who did receive *Miranda* warnings knowingly and voluntarily waived his rights. See *Fare*, 442 U.S. at 725; cf. *In re Gault*, 387 U.S. 1, 55 (1967). These voluntariness and waiver doctrines provide a more natural home than the custody test's free-to-leave inquiry for arguments that juveniles are particularly likely to confess under pressure (*e.g.*, Pet. Br. 20) or may not understand their rights or the consequences of waiving them (*e.g.*, ABA Amicus Br. 14). Congress and various state legislatures have, moreover, supplemented these constitutional rules with various carefully calibrated statutory protections for juveniles. See, *e.g.*, ABA Br. App. A1-A4; see also, *e.g.*, 18 U.S.C. 5033 (parental-notification and other rights for juveniles "taken into custody").

Petitioner and his amici contend that because other constitutional doctrines and statutes already take age into account, inserting age into the custody test would impose "no additional burden" on officers or courts. Pet. Br. 22; see, *e.g.*, Juvenile Law Ctr. Amicus Br. 28-30. That is not so. First, as discussed, the custody test per-

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[6] The trial court here determined that petitioner's statements were voluntary. J.A. 102a. On appeal, petitioner challenged only the trial court's determination that petitioner was not in custody when he made the statements. J.A. 53a; see Pet. C.A. Br. 1.

forms a unique clarifying function by defining the line between questioning that requires special procedures and questioning that does not. See pp. 14-17, *supra*. It is telling that Congress and most state legislatures, when they wish to provide special protections for juvenile suspects, often do so by *adopting* the custody test as the point at which additional procedures are necessary, and never by expressly *modifying* that test to require consideration of age. See Pet. Br. 15-17; ABA Br. App. A1-A4; see also, *e.g.*, 18 U.S.C. 5033. Second, whereas a statute conferring additional protections on persons of certain ages (*e.g.*, 18 U.S.C. 5033) provides a bright-line rule for police to follow (once age is determined), consideration of age in the custody analysis requires on-the-spot psychological conjecture. See Section C.1, *supra*.

Petitioner and his amici relatedly err in discounting the incentives officers already have under existing law to provide *Miranda* warnings to juveniles. The prospect that an unwarned statement will be inadmissible in the prosecution's case in chief provides significant encouragement to give *Miranda* warnings whenever officers believe there is a reasonable likelihood the suspect is "in custody." Cf. *Harris* v. *New York*, 401 U.S. 222, 225 (1971) ("[S]ufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief."). Police officers who engage in questioning before giving *Miranda* warnings also run the risk of a judicial finding that the statement was coerced. *Davis* v. *North Carolina*, 384 U.S. 737, 740-741 (1966). In that event, any statement would be unusable, and the admissibility of any subsequent statement would be imperiled. See *Seibert*, 542 U.S. at 600; *Oregon* v. *Elstad*, 470 U.S. 298, 310 (1985). The incentive to give *Miranda* warnings is especially great when the officer interviews someone

known to be a juvenile, because it is well established that age weighs heavily in voluntariness determinations. See generally *Gallegos*, 370 U.S. at 54. In contrast, officers who give *Miranda* warnings and obtain explicit and valid waivers before speaking with the accused are far more likely to persuade courts that all the statements they have obtained are voluntary. As this Court has explained, "cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Dickerson*, 530 U.S. at 444 (brackets omitted) (quoting *Berkemer*, 468 U.S. at 433 n.20).

Finally, petitioner's suggestion that there is a particular need to consider age in the custody test when an interview occurs at school, Pet. Br. 26-28, is misplaced. Location—including the school setting of an interview—is, of course, one of the objective factors that bears on the custody test (as well as the due process voluntariness test). See pp. 13, 15-16, *supra*. But to the extent that petitioner argues that the school setting should have particular weight in the *Miranda* custody analysis, those arguments are neither within the scope of, nor logically antecedent to, the solely age-related question on which this Court granted certiorari. See Pet. i. And to the extent that petitioner instead argues that consideration of age is necessary to properly calibrate the pressures that a student might feel when interviewed at school, that argument is mistaken. A court or officer need not try to replicate the mindset of a juvenile in order to understand and account for the school environment. Substantial numbers of non-juveniles, as well as juveniles, attend school. See p. 25, *supra*.

Furthermore, restrictions in the school setting can be relevant in establishing baseline restraints and expectations. The Court has, for example, held that the far more restrictive environment of incarceration to serve a sentence in a prison does not automatically constitute "custody" for *Miranda* purposes, although additional restraints in a prison interview may amount to "custody." *Shatzer*, 130 S. Ct. at 1224; see, *e.g.*, *United States* v. *Ellison*, No. 09-1234, 2010 WL 1493847 (1st Cir. Apr. 15, 2010) (Souter, J.) (interview in prison library noncustodial), cert. denied, 131 S. Ct. 295; cf. *INS* v. *Delgado*, 466 U.S. 210, 218 (1984) (questioning of worker in factory by agents blocking exits not a seizure under the Fourth Amendment).[7] The possibility that law-enforcement officers may interview juveniles at school accordingly provides no sound basis for either a general or a school-specific extension of the *Miranda* custody test to require consideration of the psychological effects of age.

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[7] Future cases, in which the location issue is presented for decision, will provide the Court with the opportunity to further explain the role that background environmental restrictions may play in the *Miranda* custody analysis. See, *e.g.*, *Howes* v. *Fields*, cert. granted, No. 10-680 (Jan. 24, 2011) (presenting question whether it is clearly established in the Court's precedents that a prisoner is always in *Miranda* custody whenever he is isolated from the general prison population and questioned about conduct occurring outside the prison).

CONCLUSION

The judgment of the Supreme Court of North Carolina should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

J.D.B.,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

On Writ of Certiorari to
The Supreme Court of North Carolina

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae American Bar Association ("ABA") respectfully requests that this Court reverse the decision of the Supreme Court of North Carolina and hold that, based on current scientific knowledge of the developmental characteristics of juveniles, a court's *Miranda* custody determination for any person under the age of 18 must include a determination of whether a reasonable person of the juvenile's age would have felt free to terminate police questioning and leave.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its nearly 400,000 members span all 50 states and other jurisdictions, and include attorneys in private law firms, corporations, non-profit organizations, government agencies and prosecutor and public defender offices, as well as

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authorized this brief in whole or in part, and that no person or entity, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Consent to the filing of the brief was granted by both parties.

judges, legislators, law professors and law students.[2]

The ABA has taken an active role in advocating for the improvement of the juvenile justice system.[3] The Juvenile Justice Committee of the ABA's Criminal Justice Section is composed of lawyers who specialize in juvenile justice issues. In conjunction with the Institute of Judicial Administration ("IJA"), the ABA spent over nine years developing standards for the administration of juvenile justice, which culminated in the publication in 1980 of the IJA-ABA Juvenile Justice Standards; and republication in 1996.[4]

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[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[3] The term "juvenile" in this brief refers to individuals who are under the age of 18.

[4] The Standards became official ABA policy when they were adopted by vote of the ABA House of Delegates. The ABA House of Delegates is composed of more than 500 representatives from states and territories, state and local bar associations, affiliated organizations, ABA sections and divisions, and the Attorney General of the United States, among others. *See* ABA General Information, available at http://new.abanetorg/leadership/delegates.html (last visited Dec. 20, 2010).

These Standards resulted from an exhaustive historical, legal and criminological study of society's response to juvenile crime and reflect the expertise and knowledge of legal practitioners and of experts who work with juvenile offenders. The volume titled "Standards Relating to Police Handling of Juvenile Problems" addresses police investigations, of which Standard 3.2 states, in pertinent part: "For some investigative procedures, greater constitutional safeguards are needed because of the vulnerabilities of juveniles. Juveniles should not be permitted to waive constitutional rights on their own."

In 1997, in response to a growing number of state statutes and policies allowing the transfer of juvenile offenders to the adult criminal justice systems, the ABA created its Task Force on Youth in the Criminal Justice System. In 2001, this Task Force published its report, Youth in the Criminal Justice System: Guidelines for Policymakers and Practitioners (ABA 2001) ("2001 ABA Report"). When it was adopted as ABA policy in 2002, the ABA formally recognized that children are developmentally different from adults.[5] The ABA has continued to adopt policies based on the characteristics of youth, the most recent of which

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[5] ABA Report with Recommendation #101D (Policy adopted Feb. 2002), available at http://www.abanet.org/crimjust/juvjus/jjpolicies/YCJSReport.pdf and http://www.abanet.org/crimjust/policy/cjpol.html (last visited December 20, 2010).

was ABA Report with Recommendation #102B (Policy adopted Feb. 2010), in which the ABA urges the development of simplified *Miranda* warnings for use with juveniles, in light of their verbal comprehension levels.[6]

The ABA drew upon its experience in the juvenile justice field when it filed its *amicus curiae* briefs in *Roper v. Simmons*, 543 U.S. 551 (2005) and *Graham v. Florida*, 130 S. Ct. 2011 (2010).[7] In those briefs, the ABA endorsed criminal justice policies that account for factors unique to juveniles that affect their culpability. These factors include diminished – as compared to adults – maturity, self-restraint, experience and judgment, decision-making capabilities, capacity to assist in their own defense, and appreciation of the long-term consequences of their actions – factors that simultaneously make them more susceptible to influence and intimidation, and more likely to falsely confess to an offense they did not commit. *See* ABA Brief in *Roper*, 2004WL1617399, at 2 and ABA Brief in *Graham*, 2009WL2197339, at 11-12.

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[6] Available at http://www.abanet.org/leadership/2010/midyear/daily_journal/102B.pdf (last visited December 20, 2010).

[7] The ABA brief for *Graham v. Florida* was also filed in the companion case, *Sullivan v. Florida*, for which the writ was subsequently dismissed as improvidently granted. The ABA briefs for *Roper* and *Graham* are available at http://www.abanet.org/amicus/briefs98-03.html (last visited December 20, 2010).

Having developed expertise over the course of many years of work with prosecutors, defense attorneys, academics, and others in the juvenile justice field, the ABA suggests that its views may assist the Court in this case.

SUMMARY OF ARGUMENT

The ABA respectfully submits that this Court should reverse the decision of the Supreme Court of North Carolina and hold that a *Miranda* custody determination for any person under the age of 18 must include a determination of whether a reasonable person of the juvenile's age would have felt free to terminate police questioning and leave.

This Court, as well as many state courts, state legislatures, the ABA and extensive scientific research, have recognized the unique vulnerabilities of children. Children are less capable than adults of making critical decisions in an informed, mature manner. They are more impulsive and reckless, less self-disciplined, and have less capacity to understand the long-term consequences of their actions. Further, the confessions of children require particular caution. Studies show that children are more susceptible to coercion and pressure, can be overwhelmed by circumstances that would not impact a reasonable adult, and are more likely to make false confessions than are adults.

In the present case, the circumstances petitioner faced when questioned – being escorted by police from his classroom to a school conference room where, with the door closed and without the

guidance of a parent or guardian but in the presence of school officials, he was questioned by a police officer and urged to confess after initially denying culpability – would have a far different impact on a reasonable 13 year old than on a reasonable adult.

While some children will have a greater understanding of their constitutional rights than some adults, society has drawn distinctions based on the unique vulnerabilities of children in many areas of the law. The approach requested by the ABA would ensure that the constitutional protections afforded to juveniles in *Miranda* custody determinations are not less than those guaranteed to adults.

ARGUMENT

THE DEVELOPMENTAL ATTRIBUTES OF CHILDREN RENDER THEM UNIQUELY VULNERABLE TO POLICE QUESTIONING.

Children are developmentally different from adults and possess greater vulnerabilities than adults, and therefore deserve considerations and protections under the law that are not always applicable to adults. *Roper v. Simmons,* 543 U.S. 551 (2005) (holding it unconstitutional to execute offenders who were under 18 at the time of their offenses). In *Roper,* the Court recognized that juveniles have diminished culpability based on their "lack of maturity and an underdeveloped sense of responsibility" that are "found in youth more often than in adults [and that] often result in

impetuous and ill-considered actions and decisions." *Id.* at 569 (citations omitted). The Court further recognized that "juveniles are more susceptible to negative influences and outside pressures." *Id. See also Graham v. Florida*, 130 S. Ct. 2011, 2026-28 (2010) (recognizing "lack of maturity," "impetuous and ill-considered actions and decisions" and greater vulnerability to outside pressures that precludes the imposition of life without the possibility of parole on non-homicide juvenile offenders).

These same characteristics of children – immaturity, impetuous decision-making, and greater susceptibility to influence and pressure – that this Court has recognized in the context of Eighth Amendment analysis are equally present when a child is involved in a *Miranda* custody analysis, which asks how "a reasonable person in the position of the individual being questioned would gauge the breadth of his or her 'freedom of action.'" *Stansbury v. California*, 511 U.S. 318, 325 (1994). A child's vulnerabilities are significant in the specific context of police interrogations. *See, e.g., Haley v. Ohio*, 332 U.S. 596, 599 (1948) (recognizing that what "would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens" and that "special care in scrutinizing the record" is required because a child can be "an easy victim of the law"); *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (holding that a child "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions."); *In re Gault*, 387 U.S. 1, 48 (1967) (recognizing that "the distrust of

confessions made in certain situations . . . is imperative in the case of children from an early age through adolescence.").

Numerous other authorities are in accord. Over half of the fifty states have adopted laws that distinguish between children and adults in terms of a child's rights or an officer's obligations in connection with arrest, detention, and questioning.[8] North Carolina – the state at issue in this case – does not allow the admission into evidence of any in-custody confession resulting from the interrogation of a child under the age of 14 unless a parent, guardian or counsel was present. N.C. Gen. Stat. § 7B-2101 (2005). Several states provide statutory protections that attach regardless of the outcome of the custody analysis. Connecticut, for example, deems all admissions, confessions, and statements made by a child under the age of 16 inadmissible unless the statement is made in the presence of a parent or guardian, and the child and parent or guardian have been advised of the child's

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[8] *See, e.g.*, Colo. Rev. Stat. Ann. § 19-2-511 (West 2010) (statements made by a juvenile during a custodial interrogation are presumptively inadmissible unless a parent, guardian or counsel was present at the interrogation); Me. Rev. Stat. Ann. Tit. 15, § 3203-A (2010) (an arrested juvenile may not be questioned by any law enforcement officer until a parent or guardian is notified and is present at questioning or waives the right to be present at questioning). *See also*, Appendix, *supra* (identifying similar statutes).

Miranda rights.[9] Similarly, West Virginia courts may not admit most extrajudicial statements made by a child under the age of 16 unless those statements were made in the presence of the child's counsel or in the presence of, and with the consent of, the child's parent or custodian.[10]

Likewise, most state courts that considered this issue differentiate between juveniles and adults when making decisions about the custodial nature of interrogations or the admissibility of confessions.[11] The Colorado Supreme Court, for example, has ruled that "a court may consider other factors when weighing the totality of the circumstances in cases involving juveniles" including the child's age.[12] An Arizona court has held that the objective custody analysis for juveniles should be the same as that for an adult

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[9] Conn. Gen. Stat. Ann. § 46b-137 (West 2010).

[10] W. Va. Code Ann. § 49-5-2 (West 2010)

[11] *See, e.g.*, Appendix, *supra* (identifying some of these cases).

[12] *People v. Howard*, 92 P.3d 445, 450 (Colo. 2004) (listing age, presence of or knowledge by the parents, the time, place and purposes of the encounter, and the persons present during the interrogation among the relevant factors).

but with "additional elements that bear upon a child's perceptions and vulnerability."[13]

These legislative and judicial determinations are firmly supported by scholarly research. Empirical studies confirm that adolescents are more impulsive, less able to exercise self-control, and less able to consider the long-term consequences of their actions than adults. *See* Elizabeth Cauffman & Laurence Steinberg, *(Im)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 Behav. Sci. & L. 741, 748-49, 754 & tbl 4 (2000); Franklin E. Zimring, *Penal Proportionality for the Young Offender in Youth on Trial: A Developmental Perspective on Juvenile Justice*, 271, 280, 282 (Thomas Grisso & Robert G. Schwartz eds. 2000); Bonnie Halpern-Felscher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 J. Applied Developmental Psychol. 257, 264-70 (2001). *See also Roper*, 543 U.S. at 569 (citing Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychol. 1009, 1014 (2003)).

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[13] *In re Jorge D.*, 43 P.3d 605, 607-09 (Ariz. Ct. App. 2002) (examining cases from other jurisdictions involving police questioning in a principal's office, concluding that age, the time and place of questioning, and the presence of a parent or other supportive adult should be factors in a custodial determination).

Other studies show that unique attributes of children should be relevant to the *Miranda* custody analysis. Children are less likely to comprehend their rights while being questioned by police or to recognize the risks inherent in their choice. Thomas Grisso, et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 Law. & Human Beh. 333, 357 (2003). Children are more susceptible to interrogation techniques than adults: they have propensity to comply with authority figures, are more likely to confess to police rather than remain silent, and are less capable of considering the long term consequences of their decisions. *Id.* Children's lack of appreciation of long-term consequences impairs their ability to make appropriate decisions regarding their legal strategy and to communicate exculpatory facts effectively – even to their counsel, when representation is available. Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 Crim. Just. 27, 28 (Summer 2000).

Developmental psychology studies have found that children and adolescents are more suggestible and therefore are particularly vulnerable to coercive questioning techniques. Patrick M. McMullen, Comment, *Questioning the Questions: Impermissibility of Police Deception in Interrogation of Juveniles*, 99 Nw. U. L. Rev. 971, 995 (2005). Because of their greater tendency to base their decisions on emotions rather than logic and reason, adolescents are vulnerable to police interrogation techniques that confront them with

false evidence. McMullen, 99 Nw. U. L. Rev. at 995 (citing Thomas Grisso, *What We Know About Youths' Capacities as Trial Defendants, in Youth on Trial: A Developmental Perspective on Juvenile Justice* 158-59 (2000)). Indeed, police interrogation textbooks recommend the use of psychological themes with children that place blame for their actions on environmental and home factors to encourage a response, while simultaneously acknowledging that due to their immaturity the "symptoms displayed by a youthful suspect may be unreliable." Fred E. Inbau & John E. Reid, *Criminal Interrogation and Confessions*, 298-301 (4th ed. 2001).

Susceptibility to pressure from authority makes children more compliant and more open to suggestion than adults, resulting in a greater likelihood that children will agree to a false or incorrect version of the events during police questioning and, when questioned suggestively, will be more likely to provide unreliable information. Tamar R. Birckhead, *The Age of the Child: Interrogating Juveniles After Roper v. Simmons*, 65 Wash. & Lee L. Rev. 385, 414-415 (2008). As a result, social scientists have identified childhood as a "substantial risk factor" for false confessions. *Id.* at 414-15 (citing Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 Psychol. Sci. in Pub. Interest 33, 52 (2004)).

This tendency was illustrated in high profile cases such as the Central Park jogger case, in which all five false confessors were 14-15 years old,

and a murder case in Chicago, in which 7 and 8 year old boys confessed, providing details that matched the crime scene, only to have police drop the charges when the crime lab later discovered semen on the victim that matched the DNA of a local sex offender. Kassin & Gudjonsson, 5 Psychol. Sci. in Pub. Interest at 52. One study seeking to elicit false confessions found false confessions rates of 78% among 12 to 13-year olds, 72% among 15 to 16 year-olds and 59% among young adults (ages 18-26). *Id.* at 52-53. Another study that looked at exonerations between 1989-2003 found that 14 out of 33 individuals who were falsely convicted as juveniles – that is, 42 percent – had made false confessions. Samuel Gross, et al., *Exonerations in the United States, 1989 through 2003*, 95 J. Crim. L. & Criminology 523, 545 (2004). Among those between 12 and 15 years old, 69 percent had confessed to crimes they did not commit. *Id.*

Children's susceptibility to interrogative pressure and negative feedback from authority figures, and children's greater concern with their immediate predicament (*i.e.* detention or release) than with long range consequences (*e.g.* whether the police would infer guilt from silence, search for additional evidence, and initiate legal proceedings) make children far more vulnerable to false confessions. *Id.* This focus on short-term consequences tends to make children believe that confessing to a crime will end police questioning, free them from custody and allow them to go home, while believing they can later take back a false confession. Marty Beyer, *Immaturity, Culpability*

& Competency in Juveniles: A Study of 17 Cases, 15 Crim. Just. 27, 28-29 (Summer 2000).

Furthermore, children often exhibit behaviors that are common to children but that investigators are trained to associate with deception. For example, despite their inability to comprehend legal terminology, studies have found that children do not seek clarification of terms they do not understand. Instead they pause, hesitate or equivocate, and then give an answer. Birckhead, 65 Wash. & Lee L. Rev. at 417. As a result of anxiety and lack of confidence during questioning, children often avoid eye contact, qualify statements, respond in monosyllables, and provide difficult-to-follow narratives, all of which are characteristics that investigators are trained to identify as signals of deception. *Id.*

These vulnerabilities mean that, during police interrogations, it is more burdensome for a child than for an adult to exercise his or her rights and to enjoy the same protections. Recognizing this vulnerability, the ABA has concluded that "[f]or some investigative procedures, greater constitutional safeguards are needed because of the vulnerabilities of juveniles. Juveniles should not be permitted to waive constitutional rights on their own." ABA Juvenile Justice Standards Relating to Police Handling of Juvenile Problems, §3.2. "[B]oth as a constitutional matter and as a matter of public policy, juveniles should not be allowed to waive their privilege against incrimination and their right to counsel without mature guidance" through

a parent, guardian or counsel called to assist the child. *Id.*, Commentary at 69-70.

Further, juvenile offenders typically exhibit low levels of achievement and cognitive function compared to adults and even compared to their peers.[14] In 2010, after considering the research establishing that juvenile offenders often exhibit limited verbal comprehension as compared to adults, the ABA concluded that simplified *Miranda* warning language should be developed for use with juvenile arrestees. ABA 2010 Report with Recommendation #102(B) (policy adopted Feb. 2010).[15]

Finally, in considering a school setting, the Court, in *Lee v. Weisman*, 505 U.S. 577 (1992), recognized the "subtle coercive pressure in the elementary and secondary public schools," and although "indirect coercion....may not be limited to the context of schools...it is most pronounced there." *Id.* at 592. Indeed, because school policies typically prohibit children from walking away from school authorities until they are dismissed,

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[14] Texas Youth Commission, Commitment Profile for New Commitments: Fiscal Years 2005-2009. (2009) available at http://www.tyc.state.tx.us/research/profile.html (last visited December 20, 2010) (confirming that over 50% of more than 10,000 detainees exhibit IQ scores below 90).

[15] Available at http://www.abanet.org/leadership/2010/midyear/daily_journal/102B.pdf (last visited Dec. 20, 2010).

children reasonably may believe that they cannot simply refuse to answer questions and walk out of a room – even without the additional coercive presence of a police investigator. Paul Holland, *School Miranda: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 Loy. L. Rev. 39, 85-86 (2006).

The foregoing research confirms what parents intuitively understand: children are different. It illustrates why, in petitioner's case, it would have been reasonable for a 13 year old to understand his circumstances far differently than would a reasonable adult, when he was questioned by police in a school setting without the assistance of a parent, guardian or counsel to help him understand his situation, his rights, the consequences of his decisions to talk to police and school officials – and most important – his right to terminate police questioning and leave the room. When held to an adult-based "reasonable person" standard, children are afforded fewer constitutional protections than those guaranteed to adults because children are less mature, more vulnerable and more susceptible to pressure and authority, less capable of understanding the custodial nature of an environment and any right to walk away, and less capable of making informed decisions about their fundamental rights and of understanding the long-term consequences of their actions.

To be sure, some juveniles will possess greater maturity, intelligence and capacity to understand their constitutional rights than some adults. Nonetheless, in determining that

executions are unconstitutional for children who commit crimes when under 18, this Court recognized that "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood." *Roper*, 543 U.S. at 574. Similar distinctions should be drawn in *Miranda* custody determinations, which should include a determination of whether a reasonable person of the child's age would have felt free to terminate police questioning and leave.

Such a rule would comport with this Court's preference for objective standards. *Yarborough v. Alvarado*, 541 U.S. 652, 667 (2004). The age of a child "is an objective circumstance" that "is not a special quality, but rather a widely shared characteristic that generates commonplace conclusions about behavior and perception. To focus on the circumstance of age in a case like this does not complicate the 'in custody' inquiry." *Id.* at 674 (Breyer, J. dissenting). Juvenile custody inquiries would be determined based on how a reasonable juvenile would perceive his or her circumstances. *Id.* at 661 ("custody must be determined based on how a reasonable person in the suspect's situation would perceive his circumstances."); *Stansbury*, 511 U.S. at 325 (officer's "beliefs are only relevant to the extent they would affect how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action . . . .[or] freedom to leave."); *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) ("the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.").

To ensure that the constitutional protections afforded to juveniles are not less than those guaranteed to adults, the ABA respectfully asserts that *Miranda* custody determinations for those under 18, being the age that society has deemed the age of majority, must include consideration of the child's age.

CONCLUSION

For the reasons stated above, *amicus curiae* American Bar Association requests that this Court reverse the judgment of the Supreme Court of North Carolina and hold that a *Miranda* custody determination for any person under the age of 18 must include a determination of whether a reasonable person of that age would have felt free to terminate police questioning and leave.

Respectfully submitted,

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APPENDIX

EXAMPLES OF STATE STATUTES DISTINGUISHING BETWEEN CHILDREN AND ADULTS IN TERMS OF A CHILD'S RIGHTS OR AN OFFICER'S OBLIGATION IN CONNECTION WITH ARREST, DETENTION, AND QUESTIONING

Ala. Code § 12-15-202 (1975) (requiring police to use warning language understandable to a child);

Ark. Code Ann. § 9-27-317 (West 2010) (including maturity and parental agreement as factors in a waiver analysis);

Cal. Welf. & Inst. Code § 625 (West 2010) (granting juveniles the right to telephone parents before police perform certain tests);

Colo. Rev. Stat. Ann. § 19-2-511 (West 2010) (making admission of juvenile statements contingent upon whether a parent or legal custodian was present);

Conn. Gen. Stat. Ann. § 46b-137 (West 2010) (making juvenile statements inadmissible unless reasonable efforts to contact a parent or guardian have been made);

Fla. Stat. Ann. § 985.101 (West 2010) (requiring parental notification when a child is taken into custody);

Ga. Code Ann. § 15-11-7 (West 2010) (creating due process rights for juveniles);

Haw. Rev. Stat. § 571-32 (West 2010) (requiring that when a child is taken into custody his parents, guardian, or legal custodian be notified immediately);

Idaho Juvenile Rules, Rule 9 (requiring that both the juvenile and the juvenile's parent(s), guardian, or custodian be notified of the right to counsel and the potential consequences of confessions);

705 Ill. Comp. Stat. Ann. 405/5-401.5 (West 2010) (making juvenile statements presumptively inadmissible if made as the result of a custodial interrogation);

Ind. Code Ann. § 31-32-5-4 (West 2010) (listing several additional factors to be considered when evaluating whether a juvenile's waiver was made knowingly and voluntarily, including child's mental and emotional maturity and the presence or knowledge of parent or guardian);

Iowa Code Ann. § 232.19 (West 2010) (requiring that a child's parent, guardian, or custodian be notified when the child is taken into custody);

Kan. Stat. Ann. 38-2333 (West 2010) (barring all admissions and confessions made by juveniles under fourteen years of age unless made following a consultation between the juvenile's parent or attorney);

Me. Rev. Stat. Ann. Tit. 15 § 3203-A (2009) (prohibiting law enforcement officers from

questioning a juvenile before reasonable efforts have been made to contact the legal custodian of the juvenile);

Miss. Code Ann. § 43-21-311 (West 2010) (granting juveniles the right to telephone a parent, guardian, or custodian immediately upon being taken into custody);

Mo. Ann. Stat. § 211.059 (West 2010) (granting juveniles the right to have a parent, guardian, or custodian present during police questioning);

Mont. Code Ann. § 41-5-331 (2009) (requiring that law enforcement officers immediately notify the parents, guardian, or legal custodian of any youth that is taken into custody);

N.M. Stat. Ann. § 32A-2-14 (1978) (listing age and education as factors to be considered in determining whether a child knowingly, intelligently, and voluntarily waived the child's rights);

N.Y. Family Court Act § 305.2 (McKinney 2010) (prohibiting the questioning of children unless the child and the parent or other person legally responsible for the child's care have been advised of the child's rights);

N.C. Gen. Stat. Ann. § 7B-2101 (West 2010) (specifying procedures to be used in juvenile custodial interrogations);

N.D. Cent. Code Ann. § 27-20-27 (West 2010) (granting due process rights to juveniles);

Okla. Stat. Ann. Tit. 10A § 2-2-301 (West 2010) (listing rules for juvenile custodial interrogations, and prohibiting admission from custodial interrogation of children under age 14 without presence of parent or guardian);

Tenn. Code Ann. § 37-1-127 (West 2010) (creating restrictions on what extrajudicial statements may be admitted against a juvenile);

Tex. Fam. Code Ann. § 51.095 (West 2010) (listing requirements for the admission of statements made by a child);

Wash. Rev. Code Ann. § 13.40.140 (West 2010) (requiring that any waiver of a juvenile's rights come from the parent, guardian, or custodian if the juvenile is under twelve years of age);

W. Va. Code Ann. § 49-5-2 (West 2010) (barring admission of all extrajudicial statements made by juveniles unless made in the presence of juvenile's counsel, or in the presence of, and with the consent of, the juvenile's parent or custodian).

EXAMPLES OF STATE COURT CASES DISTINGUISHING BETWEEN CHILDREN AND ADULTS REGARDING THE CUSTODIAL NATURE OF INTERROGATIONS OR THE ADMISSIBILITY OF CONFESSIONS

In re Jorge D., 43 P.3d 605, 608 (Ariz. Ct. App. 2002) (concluding that "additional elements that bear upon a child's perceptions and vulnerability, including the child's age, maturity and experience with law enforcement and the presence of a parent or other supportive adult" relevant to objective custodial interrogation test);

State v. Doe, 948 P.2d 166, 173 (Idaho Ct. App. 1997) (same);

People v. Howard, 92 P.3d 445, 450 (Colo. 2004) (listing age and presence of or knowledge by the parents as among "other factors" that a court may consider in juvenile cases);

In re Joshua David C., 698 A.2d 1155, 1162 (Md. Ct. Spec. App. 1997) ("in determining whether a juvenile's statement was made while in custody, the court must consider additional factors, such as the juvenile's education, age, and intelligence.") (citation omitted);

People v. Givans, 575 N.W.2d 84, 88 (Mich. Ct. App. 1997) (factors to consider for admissibility of confession include, among others, age, education, and intelligence level, and presence of a parent, custodian, or guardian);

In re the Welfare of M.A.K., 667 N.W.2d 467, 471 (Minn. Ct. App. 2003) (factors to consider for custodial determination include "child's age, intelligence, education, experience with the law, the warning given, and the presence or absence of the child's parents.") (citation omitted);

State v. Presha, 748 A.2d 1108, 1114-15 (N.J. 2000) (holding that statements made in interrogation of a child under 14 years of age are inadmissible unless an adult was present, or unwilling or "truly" unable to be present);

State v. Javier M., 33 P.3d 1, 5 (N.M. 2001) (holding that a juvenile must be afforded protections similar to those under *Miranda* while in investigatory detention, not custodial detention);

Matter of Chad L., 131 Misc. 2d 965, 966-67, 502 N.Y.S.2d 910, 911-12 (N.Y. Fam. Ct. 1986) *aff'd*, 131 A.D.2d 760, 517 N.Y.S.2d 58 (N.Y. App. Div. 1987) ("[I]n evaluating the totality of the circumstances surrounding the interrogation of a juvenile to determine whether such interrogation must be deemed 'custodial', the age of the juvenile must be considered a major factor.");

In re Watson, 548 N.E.2d 210, 213 (Ohio 1989) ("In deciding whether a defendant's confession is involuntarily induced, the court should consider the totality of the circumstances, including the age . . . of the accused . . . .");

State ex rel. Juvenile Dept. of Multnomah County v. Loredo, 865 P.2d 1312, 1315 (Or. Ct. App. 1993)

(applying test of "whether a reasonable person in child's position – that is, a child of similar age, knowledge and experience, placed in a similar environment – would have felt required to stay and answer all of [the] questions.");

In re D.A.R., 73 S.W.3d 505, 510-11 (Tex. App. 2002) (holding that "consideration of the age of the juvenile is appropriate" in determining whether interrogation was custodial);

State v. D.R., 930 P.2d 350, 353 (Wash. Ct. App. 1997) (citing the juvenile defendant's youth as among the factors, which also included "the naturally coercive nature of the school and principal's office environment for children of his age," in determining that an interrogation was custodial);

CSC v. State, 118 P.3d 970, 977-78 (Wyo. 2005) ("Following Justice O'Connor's reasoning, we acknowledge that there could be instances where the suspect is so young that his age must be considered by the police.").

AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

J.D.B.,

Petitioner,

—v.—

STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 550,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In support of those principles, the ACLU has appeared in numerous students' rights cases before this Court from *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969) to *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009).

The ACLU and its affiliates throughout the country work daily in the courts and in legislatures to safeguard the rights of children in school. As a result of that work, the ACLU has identified the "school to prison pipeline," a set of policies and practices that render at-risk youth more likely to become incarcerated than to receive a high school diploma, as a major civil rights challenge of our time. Because the ACLU is committed to ensuring that youth in public schools obtain the constitutional protections to which they are entitled, the proper resolution of this case is a matter of significant concern to the ACLU and its members.

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[1] No counsel for party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made any monetary contribution towards the preparation and submission of this brief. Blanket letters of consent to the filing of *amicus* briefs have been lodged by both parties with the Clerk of the Court.

STATEMENT OF THE CASE

Thirteen year-old Petitioner J.D.B. was accused of breaking and entering into two homes and stealing various items. On the day of the break-ins, police officers questioned him, presumably at his home, regarding the crime. *In re J.D.B.*, 686 S.E.2d 135, 136 (N.C. 2009); Pet. Cert. at 3. Unsatisfied with the results of this interview, the police decided to question petitioner for a second time at school. Pet. Cert. at 3. An investigator from the Chapel Hill Police Department went to the school, had another uniformed officer remove petitioner from his special education classroom and escort him into a closed conference room on school grounds, and again questioned petitioner about the alleged crimes. *Id.* Petitioner was not given *Miranda* warnings at any point during this interrogation. 686 S.E.2d at 136. After the assistant principal told petitioner to "do the right thing because the truth always comes out in the end," petitioner confessed to the crimes. Pet. Cert. at 4-5. After he confessed, the investigator told petitioner that he was free to leave. *Id.* at 5. The police then obtained a warrant based on the information they received during the school interrogation and searched petitioner's home. *Id.* at 5-6. He was later arrested and adjudicated delinquent.

At trial, petitioner moved to suppress the statements made to the police and the evidence seized from his home, arguing that his statements and the evidence were obtained as a result of a custodial interrogation conducted in violation of N.C. Gen. Stat. § 7B-2101 (2005), and without having been advised of his rights under *Miranda*

v. Arizona, 384 U.S. 436 (1966). *In re J.D.B.*, 674 S.E.2d 795, 798 (N.C. App. Ct. 2009). The trial court denied the motion to suppress and petitioner appealed the denial of his motion. *Id.* at 797. In May 2007, the North Carolina Court of Appeals remanded to the trial court for findings of fact supporting its determination that J.D.B. was not in custody at the time he was questioned. *Id.* On remand, the trial court entered an order making findings of fact and conclusions of law in support of its denial of J.D.B.'s motion to suppress the statement and evidence. *Id.* at 797-98. Specifically, the trial court found that petitioner was thirteen years old when questioned by the police, that he was questioned in a conference room that was closed but not locked, that he did not receive the *Miranda* warnings, and that he was not offered the opportunity to speak to a parent or guardian before being questioned by the police. *Id.* Nevertheless, the trial court judge concluded that petitioner was not in custody at the time of this interrogation ostensibly because the petitioner's "responses to the investigator's questions were appropriately responsive, indicating that he was capable of understanding the fact that he did not have to answer questions . . . [and] his responses to counsel during the suppression hearing were appropriately responsive." *Id.* at 798. That decision was affirmed by the North Carolina Court of Appeals. *In re J.D.B.*, 674 S.E.2d 795, 800 (N.C. App. Ct. 2009).

Petitioner then appealed to the North Carolina Supreme Court. In a 4-3 opinion, the North Carolina Supreme Court affirmed the

decision of the Court of Appeals, finding that petitioner was not in custody when he was interrogated by the police at his school. *In re J.D.B.*, 686 S.E.2d 135 (N.C. 2009). In reaching this conclusion, the state supreme court expressly declined to consider petitioner's age among the totality of circumstances relevant to determining custody. In the majority's view, "the custody inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect's individual characteristics–including his age–could be viewed as creating a subjective inquiry." *In re J.D.B.*, 686 S.E.2d at 140, quoting *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004).

This Court granted certiorari to decide whether a court may consider a juvenile's age in a *Miranda* custody determination.

Summary of Argument

This case is not about whether school principals may question students about school misconduct. Nor is it about precautionary measures taken to maintain order and safety in our public schools. Rather, this case is limited to examining the role of police officers in public schools enforcing criminal laws; an interaction that now occurs on a regular basis in public schools across the nation.

Recognizing that custodial interrogation is inherently coercive, this Court held in *Miranda v. Arizona* that the Fifth Amendment privilege against self-incrimination requires police to inform suspects of their rights before engaging in custodial interrogation. This Court has also held in *Miranda* and subsequent cases that the

question of whether a suspect is in custody, and thus entitled to *Miranda* warnings, turns on an objective evaluation of the totality of the circumstances.

Amici agree with petitioner that the age of a juvenile suspect is an appropriate factor to consider under *Miranda* in deciding whether a reasonable person in similar circumstances would feel free to leave the room and end the interrogation. However, we do not repeat that argument at length here. Instead, this brief focuses on a related point. The school setting itself is an additional factor that should be considered in determining custody and applying *Miranda*. Students are not free agents in school. They are not free to leave their classrooms, they are not free to leave the principal's office, and there is no reason for a child to believe that he or she is free to leave a police interrogation conducted in school as part of a law enforcement investigation.

Having litigated and conducted extensive research on issues relating to law enforcement in public schools, we respectfully submit this brief to draw the Court's attention to the increasing prevalence of police in schools, the criminalization of student behavior that was previously treated as a school discipline problem, and the importance of safeguarding the *Miranda* rights of children who are subject to police interrogations in school that can and often do lead to criminal arrests.

ARGUMENT

Miranda v. Arizona requires a court to analyze two questions in determining whether a suspect is in custody and must therefore be given the familiar *Miranda* warnings before being interrogated. "First, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). If, given the totality of the circumstances, a reasonable person would not have known that he or she was free to leave and terminate the interrogation, the interrogation may proceed only if the suspect is informed of his or her *Miranda* rights. Absent *Miranda* warnings, any subsequent statements by a suspect in custody are inadmissible. *Berkemer v. McCarty*, 468 U.S. 420, 429 (1984) ("[I]f the police take a suspect into custody and then ask him questions without informing him of the rights enumerated [in *Miranda*], his responses cannot be introduced into evidence to establish his guilt.").

At the outset, therefore, *Miranda* custody analysis demands a review of the "circumstances surrounding the interrogation" to determine whether or not there was a "restraint on freedom of movement." *Keohane*, 516 U.S. at 112. Because school children are not free to come and go as they please, their interrogation in a school building at the hands of the police necessarily involves a "restraint on freedom of movement."

Furthermore, when determining custody, courts are required to consider all the circumstances that would weigh on a reasonable person's belief that he or she is not free to leave. Beginning from this starting point, the juvenile status of a suspect, particularly when the interrogation is conducted in a middle school after pulling the youth out of a classroom, is necessarily part of the totality of circumstances to be considered in determining whether a reasonable person in the suspect's circumstances would have felt free to terminate the interrogation.

Prior to this Court's ruling in *Yarborough v. Alvarado* every jurisdiction to address the question of whether juvenile status may be considered in the *Miranda* custody determination held that it could be. Pet. Cert. at 9. Contrary to the view of the North Carolina Supreme Court, *Alvarado* does not compel the decision below. First, *Alvarado* was a habeas proceeding that gave heightened deference to the state court conviction. Thus, the Court did not reach the merits of the issue of whether a court should consider the juvenile status of a youth when conducting the custody inquiry for *Miranda*. This case, by contrast, arises on direct appeal and does not trigger the deferential standard of review involved in *Alvarado*. Accordingly, it squarely presents for the first time the question of age as a factor in the totality of circumstance *Miranda* custody analysis. Second, the factual record that informed the Court's judgment in *Alvarado* was very different than the factual record in this case. The defendant in *Alvarado* was just shy of his

eighteenth birthday when questioned by the police; the petitioner here was only thirteen years old. In addition, the defendant in *Alvarado* went to the police station voluntarily and was accompanied by his parents; the petitioner here was away from his parents when he was removed from his classroom by an armed school resource officer.

I. Age is an Appropriate Factor to Consider in Determining Custody Under *Miranda v. Arizona*.

The question presented by this case is not a new one. In applying *Miranda*, numerous lower courts have held that the age of a juvenile is an appropriate factor to consider in determining whether police interrogation is custodial or not. *See A.M. v. Butler*, 360 F.3d 787, 799 (7th Cir. 2004) (age of a juvenile is an important factor in the totality of circumstances evaluation); *State v. Doe*, 948 P.2d 166, 173 (Idaho App. Ct. 1997) ("[T]he objective test for determining whether an adult was in custody for purposes of *Miranda* . . . applies also to juvenile interrogations, but with additional elements that bear upon a child's perceptions and vulnerability, including the child's age, maturity and experience with law enforcement and the presence of a parent or other supportive adult."); *In re Andre M.*, 88 P.3d 552, 555 (Ariz. 2004) ("To determine whether a [juvenile] confession is voluntary, we consider the totality of the circumstances. . . . [A] number of factors are relevant to the totality of the circumstances analysis, including age, education, and intelligence . . . .").

The concern expressed in *Alvarado* that the police should not be left to guess at a suspect's age "before deciding how they may interrogate [a] suspect," 541 U.S. at 667, has little relevance to the facts of this case or school interrogations in general. When police officers investigate young children for criminal violations by interrogating them at a school, they know that the suspect is most likely a minor. Any uncertainty they may have can quickly be removed by asking the student or checking with school officials.

The relationship of children to adults in general, and authority figures in particular, is not the same as the relationship of one adult to another. Even in circumstances where an adult may understand that he is free to terminate a police interrogation, it defies common sense to suggest that the reactions of a child, no matter how young, are likely to be the same. A child's youth may not be sufficient to turn every police questioning into a custodial interrogation, but it should not be deemed legally irrelevant either. What if the child is only five years old and subject to arrest for a throwing a tantrum? *See* discussion *infra* p. 20 (five year-old forcibly pinned down and arrested by police in St. Petersburg, Florida after throwing a tantrum in school).

II. Courts Should Also Consider Whether or Not an Interrogation Took Place at a School in the *Miranda* Custody Analysis.

In addition to age, courts can and should consider the unique nature of the school setting in

determining whether or not a law enforcement interrogation is custodial for *Miranda* purposes. As the dissent noted below, "[u]nlike a university campus, where people may freely come and go, middle school students are not free to leave the campus without permission." *In re J.D.B.*, 686 S.E.2d 135, 143 (N.C. 2009) (Brady, J. dissenting). To the contrary, "[s]tudents at middle schools are instructed to obey the requests and directives of adults. The Student Handbook at Smith Middle School, which J.D.B. attended, instructs students to '[f]ollow directions of all teachers/adults the first time they are given.'" *Id.* Here, petitioner was told by the assistant principal to "do the right thing" when questioned by the police "because the truth always comes out." *See supra* p.2. Had he refused to answer the police officer's question after receiving this instruction from the assistant principal, petitioner would arguably have been subject to arrest on a separate charge under N.C.G.S. § 14-288.4 (which makes disturbing the peace or order of a school a misdemeanor offense).[2]

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[2] N.C.G.S. § 14-288.4(a)(6) provides that a person who willfully engages in disorderly conduct by "[d]isrupt[ing], disturbing[ing] or interfere[ing] with the teaching of students . . . or disturb[ing] the peace, order or discipline at any . . . educational institution" is "guilty of a Class 2 misdemeanor." N.C.G.S. § 14-288.4 (a) (6) (2007). At least 14 other states have equivalent statutes that criminalize offenses similar to "disrupting public school." ARIZ. REV. STAT. ANN. § 13-2911 (2002); AL. EDUC. CODE § 32210 (West 2002); GA. CODE ANN. § 20-2-1181 (2004); IOWA CODE § 718.3 (2003); MASS. GEN. LAWS ch.272, § 40 (2009); MD. CODE ANN., EDUC. § 26-101 (2002); MONT. CODE ANN. § 20-1-206 (1971); NEV. REV. STAT. § 392.910 (2003); N.D. CENT. CODE § 15.1-06-16 (1999); R.I. GEN.

A youth's fear of arrest for refusing to obey the directives of an authority figure at school would not be unreasonable given the frequency with which school-based arrests for such refusals and other minor misconduct are documented in the mainstream media. *See, e.g.*, Maureen Downey, Op-Ed, *Back Away From Balloon*, ATLANTA J. & CONST., June 1, 2009, at A9 (describing arrest and jailing of two students for throwing water balloons during a senior prank); Sharif Durhams, *Tosa East Student Arrested, Fined After Repeated Texting*, MILWAUKEE J. SENTINEL, Feb. 18, 2009, at B8 (documenting arrest of 14-year old girl for text-messaging); Denise Buffa, *Public Enemy No. 1 --- City Sued for Cuffing 4-Yr.-Old Napnixers*, N.Y. POST, Mar. 10, 2008, at 15 (reporting on two four-year olds who were handcuffed by school safety officer for refusing to take a nap at school); *see also* Luanne Austin, *'Zero Tolerance' An Excuse for Lack of Judgment*, DAILY NEWS RECORD, Apr. 28, 2009 (reporting arrest of high school student for destruction of government property after jumping up to tap a hallway clock); Colin Gustafson, *Board May Review Cop at GHS*, GREENWICH TIME, Jul. 27, 2008, at A1 (describing police officer's use of a Taser to shock a student for refusing to report to the assistant principal's office); Ann N. Simmons, *Scuffle Exposes a Racial Rift*, L.A. TIMES, Oct. 11, 2007, at B1 (documenting arrest of a 16-year old girl after dropping a piece of birthday cake and

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LAWS § 11-11-1 (2007); S.C. CODE ANN. § 16-17-420 (1972); S.D. CODIFIED LAWS § 13-32-6 (1982); TEX. EDUC. CODE ANN. § 37.123 (2006); UTAH CODE ANN. § 76-9-103 (1973).

failing to clean it up to the satisfaction of a police officer stationed at school).

In contrast to the ruling below, many lower courts have therefore held that police interrogations at school are custodial for *Miranda* purposes and suppressed incriminating statements made without *Miranda* warnings. *See, e.g., In re Interest of C.H.*, 763 N.W.2d 708, 713 (Neb. 2009) (suppressing juvenile's statement and holding juvenile's interrogation in school by police was custodial even though he had unrestrained freedom of movement during the questioning); *In re G.S.P.*, 610 N.W.2d 651, 658 (Minn. Ct. App. 2000) (suppressing juvenile's statement and finding twelve-year-old "in custody" where a uniformed police officer summoned a juvenile from the classroom to the principal's office and actively participated in the questioning; the circumstances suggested the coercive influence associated with a formal arrest); *In re M.H.*, 851 So. 2d 233, 234 (Fla. Ct. App. 2003) (suppressing a student's response to school police officer's single question where the officer failed to give *Miranda* warnings).

In a case with nearly identical facts to this one, the Oregon Court of Appeals decided that a junior high school student was in custody for *Miranda* purposes when he made incriminating statements to an armed police officer after being summoned to the principal's office and questioned about an off-campus burglary. *Matter of Killitz*, 651 P.2d 1382 (Or. Ct. App. 1982). The Oregon court emphasized that the defendant "was in school during regular hours, where his movements were controlled to a great extent by

school personnel." *Id.* The court further noted that the "defendant cannot be said to have come voluntarily to the place of questioning," because he would likely have been subjected to disciplinary actions had he refused the principal's command to come to his office. *Id.* Based upon all these factors, the court found that the juvenile had been subjected to a custodial interrogation, precluding the admission of his incriminating statements in subsequent criminal proceedings because he had not been given *Miranda* warnings. *Id.*

The Oregon decision in *Killitz* is representative of the approach followed by many courts when they assess whether an interview is custodial for *Miranda* purposes. The controlling factors typically are that the student was compelled by school authorities, acting at the behest of the police, to leave his or her classroom during school hours to speak with the police in a restrictive, private location at the school without the benefit of the student's parents or an attorney. For example, in a recent decision directly addressing the issue of school as a factor in custody analysis under *Miranda*, the Alaska Court of Appeals decided that the school environment operates as an independent restraint on children subject to police questioning. *Kalmakoff v. State*, 199 P.3d 1188 (Ala. Ct. App. 2009). Quoting from *State v. Doe*, 948 P.2d 166, 173-74 (Idaho Ct. App. 1997), the Alaska court observed: "[I]t is unlikely that the environment of a principal's office or a faculty room is considered by most children to be a familiar or comfortable setting, for students normally report to these

locations for disciplinary reasons . . . . It is also unlikely that any ten-year-old would feel free to simply leave the administrative area of the school after having been summoned there by school authorities for a police interview." *Kalmakoff v. State*, 199 P.3d at 1198-99. For these reasons, the court held, a child "would have reasonably believed that his appearance at the designated room and his submission to the questioning was compulsory and that he was subject to restraint which, from such a child's perspective, was the effective equivalent of arrest." *Id.*

State v. Doe, the Idaho case relied on by the Alaska court, involved a ten-year-old boy who was directed to leave his fifth-grade classroom and report to a room where he had been disciplined previously. While there, he was interrogated by a school police officer. Although the boy was ultimately informed that he was free to go, this did not occur until after the boy confessed, just as petitioner in this case was not informed that he was free to go until after he confessed to police officers. The Idaho court concluded that, under these circumstances, the boy was in custody and was entitled to *Miranda* warnings. *See also In re Welfare of R.J.E.*, 642 N.W.2d 708, 709-10 (Minn. 2002) (court affirmed the suppression of a confession made by a high school student who was interrogated in the school office by a uniformed police officer acting as a school "liaison" officer); *In re G.S.P.*, 610 N.W.2d 651, 657-58 (Minn. Ct. App. 2000) (court suppressed confession of a twelve-year-old who was removed from class by the assistant principal and the uniformed school liaison officer, taken to the

principal's office and told he "had no choice but to answer the questions," of the police officer).

To be clear, *amici* do not suggest that school officials, as distinct from law enforcement officers, should be required to provide *Miranda* warnings every time a student is questioned about school misconduct in the principal's office. *Cf. New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (searches conducted by school officials must be reasonable but they do not require a warrant and probable cause). But where, as here, outside police officers come to the school to question a youth about an off-campus crime, those officers should not be permitted to take advantage of the school environment to coerce statements that they would not be able to (and indeed in this case were not able to) obtain through questioning away from school grounds.

A. Police Officers are Now a Regular Presence in Public Schools.

In the last fifteen years, the number of law enforcement officers in schools has increased dramatically. In 1998, immediately following the Columbine disaster, President Bill Clinton ordered the release of $70 million in federal funding for school-based police officers. Am. Civil Liberties Union et al., Hard Lessons: School Resource Officer Programs and School-Based Arrests in Three Connecticut Towns 14 (2008) [hereinafter ACLU Hard Lessons], available at http://www.aclu.org/files/pdfs/racialjustice/hardlessons_november2008.pdf. The U.S. Justice Department's COPS in Schools (CIS) grant program was created the same year to help local

communities pay for new school police officers. *Id.* In 2006, there were over 20,000 sworn police officers assigned to schools. Ben Brown, *Understanding and Assessing School Police Officers: A Conceptual and Methodological Comment*, J. OF CRIM. JUST., Vol. 34, 591-604 (2006). And according to one study, sixty percent of high school teachers reported armed police officers stationed on school grounds. Paul Hirschfield, *The Uneven Spread of School Criminalisation in the United States*, 74 CRIM. JUST. MATTERS 28, 28 (2008). As recently as 2006, the National Association of School Resource Officers stated "that school-based policing is 'the fastest growing area of law enforcement.'" Paul Holland, *Schooling Miranda: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 LOY. L. REV. 39, 74 (2006). Although these officers are present in an educational environment, their primary duty is criminal law enforcement. *See In re R.H.*, 791 A.2d 331, 334 (Penn. 2002) (deciding that school police are "law enforcement"). Not surprisingly, therefore, the deployment of law enforcement in schools has led to a dramatic rise in youth arrests. *See e.g.*, Children's Def. Fund, AMERICA'S CRADLE TO PRISON PIPELINE 125 (2007) (noting tripling in number of school-based arrests in Miami-Dade County from 1999-2001); The Advancement Project, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 15 (Mar. 2005) [hereinafter EDUCATION ON LOCKDOWN] (documenting the growth in the number of school-based arrests in select jurisdictions[3]); Clayton

[3] For example, between 2000 and 2004, Denver Public

County Pub. Sch. [GA], EXECUTIVE REPORT OF THE BLUE RIBBON COMMISSION ON SCHOOL DISCIPLINE 47 (Jan. 2007) (noting increase in the number of school-based referrals to the juvenile court from 90 in 1996 to 1,200 in 2004, mostly for "minor offenses" that "have traditionally been handled by the school and are not deemed the type of matters appropriate for juvenile court").

B. DISCIPLINE PROBLEMS THAT WERE PREVIOUSLY HANDLED BY SCHOOL OFFICIALS ARE NOW INCREASINGLY TREATED AS LAW ENFORCEMENT ISSUES THAT SUBJECT STUDENTS TO ARREST.

Furthermore, a relatively high proportion of youth who are arrested are arrested in school. *See* Florida Dep't of Juvenile Justice, DELINQUENCY IN FLORIDA'S SCHOOLS: A FIVE YEAR STUDY 1, 4 (2009) (noting that in the 2004-05 school year, almost one in five youth sent to the juvenile justice system were from school referrals, in one county, in 2008-09, the rate was 38 percent); *see also* PENNSYLVANIA STATE SCHOOL SAFETY ANNUAL REPORT 2008-09 (documenting 11,703 arrests on primary and secondary school grounds during that year statewide). During the 2007-2008 fiscal year, the crime of "disturbing schools" was the single most frequent offense resulting in a referral to the juvenile justice system in South Carolina, representing twelve

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Schools experienced a seventy-one percent increase in the number of student referrals to law enforcement. Most of these referrals were for non-violent behavior. EDUCATION ON LOCKDOWN at 8.

percent of all cases referred to the state prosecutor. S.C. Dep't of Juvenile Justice, ANNUAL STATISTICAL REPORT 2007-2008 13 (2008), *available at* http://www.state.sc.us/dji/pdfs/2008-Statistical-Report.pdf.

The instant case involves the police arriving at the school to question a student for an outside crime. However, many schools have policies that mandate that school officials call the police to the school to deal with common misbehavior. These so-called "zero tolerance" policies create an environment where children may be sent to jail for a number school rule violations.[4] See *Antoine v. Winner Sch. Dist.*, No. 06-3007 (D.S.D. Compl. filed Mar. 28, 2006) (describing allegations of policy in which middle

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[4] Zero tolerance stands for the proposition that certain behaviors trigger severe, mandatory responses, almost always beginning with the removal of the child from the classroom and sometime extending to referral to outside law enforcement for on-campus misconduct. Zero tolerance schools impose suspensions, expulsions and arrest for infractions across the spectrum – from tardiness to weapons possession. Between 79 and 94 percent of American public schools now have zero tolerance policies. N.Y. Civil Liberties Union et al., SAFETY WITH DIGNITY: ALTERNATIVES TO THE OVER POLICING OF SCHOOLS 9 (2009), *available at* http://www.nyclu.org/files/Safety_with_Dignity.pdf. Zero tolerance policies are ineffective as a corrective measure, implemented in discriminatory manner. *Id.*; see *also* Heath Urie, *Boulder DA: Police Should Step Back From School Discipline*, BOULDER DAILY CAMERA (Dec. 13, 2010), http://www.dailycamera.com/privateschools/ci_16851028 (describing position of County District Attorney – who also served as School Board President during the 1999 Columbine murders – that zero tolerance policies are bogging down courts and disrupting the education of young people).

school and high school principals referred students accused of pushing or hitting to police for arrest). The result is yet more interaction between young students and police officers in the school environment and additional evidence for children that they have no option but to comply with adult directives while at school or risk arrest.

Whether the police are already in the school as resource officers, or brought into the school as a result of zero tolerance policies, or arrive at the school independently to conduct an investigation, their increased contact with students can lead to a student's arrest for harmless, non-criminal behavior. For example, police arrested a thirteen-year-old Florida student for repeatedly passing gas and turning off classmates' computers. Zach Smith, *Report: Martin County Student Arrested for Passing Gas, Turning Off Classmate's Computer*, TCPALM (Florida), Nov. 21, 2008, http://www.tcpalm.com/news/2008/nov/21/report-martin-county-student-arrested-passing-gas-/. Police arrested a fourteen-year-old student in Milwaukee for texting. Sharif Durhams, *Tosa East Student Arrested, Fined After Repeated Texting*, MILWAUKEE J. SENTINEL, Feb. 18, 2009, at B8. And Shaquanda Cotton, a 14-year-old high school freshman in Paris, Texas, was arrested for shoving a hall monitor. She was convicted in March 2006 of "assault on a public servant" and sentenced to a prison term of up to seven years. Bob Herbert, Op-Ed, *6-Year-Olds Under Arrest*, N.Y. TIMES, Apr. 9, 2007, at A17.

Even very young children are not immune from contact with the police in their schools. Children are being diverted from schools to the criminal justice system at an earlier and earlier age because of minor misconduct. Perhaps the most widely-reported example of the criminalization of routine school misconduct is the story of five-year-old Ja'eisha Scott. In 2005, video of Ja'eisha being forcibly pinned down and arrested by police in St. Petersburg, Florida for throwing a temper tantrum aired on the evening news nationwide. Fla. State Conference NAACP et al., ARRESTING DEVELOPMENT: ADDRESSING THE SCHOOL DISCIPLINE CRISIS IN FLORIDA 15 (2006), *available at* http://www.advancementproject.org/sites/default/files/full%20report.pdf. Prior to her arrest by the police, Ja'eisha was counting jellybeans in her math class as part of an exercise. When the teacher ended the game, she threw a tantrum. *Id.* at 14. Though she eventually calmed down in a school administrator's office, St. Petersburg police arrived at the school and handcuffed and arrested her. *Id.* Police attempted, but were unable to charge her for assault and battery. Next they tried to have her institutionalized without success. Finally, police tried to have the child removed from her mother's home by Child Protective Services. *Id.*

While the arrest of an elementary school student is extreme, it does not appear that Ja'eisha's experience was unique. Statistics reported by the Advancement Project reveal that that Ja'eisha was not the only elementary school student arrested in the county that year. During

the 2004-05 school year, there were 17 arrests of Pinellas County elementary school students. *Id.* at 21. Newspapers around the country have covered the arrest of very young students for non-criminal behavior by local police or school safety agents. For instance, two four-year-olds were handcuffed by school safety officers for refusing to take a nap. Denise Buffa, *Public Enemy No. 1 — City Sued for Cuffing 4-Yr.-Old Napnixers*, N.Y. POST, Mar. 10, 2008, at 15.

The increased number of children arrested at school has not gone unnoticed. Thomas Perez, the Assistant Attorney General for Civil Rights in the United States Department of Justice, recently remarked that "in schools across the country, we are seeing more and more students disrupted on their way to a diploma by increasingly harsh discipline practices for increasingly minor infractions."[5] Juvenile and family courts are also expressing concern about the increased criminalization of student misconduct.

The National Council of Family and Juvenile Court Judges highlighted the problem of schools improperly pushing students out into the court system in a 2005 report outlining the essential elements of effective practice in juvenile delinquency cases. David E. Grossmann &

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[5] Thomas E. Perez, Ass't Att'y Gen. for Civ. Rights, U.S. Dep't of Justice, Remarks as Prepared for Delivery by Assistant Attorney General for Civil Rights Thomas E. Perez at the Civil Rights and School Discipline: Addressing Disparities to Ensure Equal Educational Opportunities Conference (Sept. 27, 2010), at http://www.justice.gov/crt/speeches/perez_cosvsnf_speech.php.

Maurice Portley, NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN DELINQUENCY CASES 150-51 (2005). Their response has been a call for judges to "commit to keeping school misbehavior and truancy out of the formal juvenile delinquency court." *Id.* at 151.

C. POLICE INTERACTIONS WITH STUDENTS IN SCHOOL REQUIRE A DIFFERENT CONSTITUTIONAL BALANCE THAN THE ENFORCEMENT OF SCHOOL DISCIPLINARY RULES BY SCHOOL OFFICIALS.

With police-student encounters increasing, and the role of the police in schools undefined, the rights of students are at risk. For example, the New York City Police Department (NYPD) maintains a controversial program of unannounced pre-dawn installations of mobile security checkpoints at schools. Am. Civil Liberties Union et al., CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY SCHOOLS 6, 9 (2007) *available at* http://www.aclu.org/files/pdfs/racialjustice/overpolicingschools_20070318.pdf. Pursuant to this program, on the morning of November 17, 2006, the NYPD arrived at Wadleigh Public High School in Manhattan with metal detectors. *Id.* at 6. Police detained and arrested a number of students for non-criminal violations of school rules, such as having a cell phone. *Id.* Without alerting school administrators or his parents, officers arrested the student government association vice president while he stood in front

of the school waiting for his mother to take his cell phone from him. The student was transported to the police station but the charges ultimately dropped. *Id.*

In addition to questionable arrests, police have used force on students causing injury. For example, in 2007, a student running late to class was stopped by school officials. *Id.* at 14. When he protested receiving a detention, a school safety officer slammed his face into a brick doorframe, sprayed mace in his eyes and put the student in handcuffs. *Id.* The student ultimately spent 28 hours in police custody and two hours handcuffed to a hospital chair while receiving treatment for a laceration. The student was suspended and was criminally charged. *Id.*

Students of color are at an even greater risk of arrest at school than their white peers. A study of Denver Public Schools between 2000 and 2004 found that black and Latino students are 70 percent more likely to be disciplined (suspended, expelled, or ticketed) than their white peers. EDUCATION ON LOCKDOWN at 8. In Florida, black youth only represent twenty-two percent of the overall juvenile population but make up forty-seven percent of school-based delinquency referrals. Mark A. Greenwald, FLORIDA DEP'T OF JUVENILE JUSTICE, DELINQUENCY IN FLORIDA'S SCHOOLS: A FOUR YEAR STUDY 5 (2009). And a review of school police practices in Hartford, Connecticut revealed that black and Latino students account for twenty-four percent of student body but make up sixty-three percent of school based arrests. ACLU HARD LESSONS at 35-43. The report also found that students of color

were more likely to be arrested at school than white students committing the same infractions. *Id.*

* * * * *

Police officers have a proper role to play in preserving public safety in our schools and elsewhere. But as more and more police are stationed in schools, and as more and more disciplinary offenses now lead to criminal prosecution, it is also important for this Court to reaffirm that "students do not shed their constitutional rights at the schoolhouse gate." *Tinker v. Des Moines*, 393 U.S. 503, 506. In this context, that simple but fundamental principle means that the age of the child and the reality of the school setting should both be considered in deciding whether *Miranda* warnings are required. By failing to do so, the decision below deprived the petitioner of his *Miranda* rights.

Conclusion

For the reasons stated herein, the judgment should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

4

No. 09-11121

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IN THE

Supreme Court of the United States

J. D. B.,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

BRIEF OF CENTER ON WRONGFUL CONVICTIONS OF YOUTH, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The organizations and individuals submitting this brief are practitioners, law professors, and researchers from a variety of disciplines who are experts on the effects of custodial interrogations on juvenile suspects. Amici know from their combined experience that juveniles' immaturity, vulnerability to external pressure, and diminished ability to weigh risks and long-term consequences renders them uniquely susceptible to making false confessions and statements when interrogated in a custodial setting, especially those under the age of fifteen. Accordingly, Amici share a concern that the North Carolina Supreme Court's decision that *Miranda* custody decisions must be made without regard to age would harm the courts' truth-seeking function by increasing the likelihood of uncounseled and unreliable police-induced statements from juveniles. For these reasons, Amici assert that age should be considered a factor in the traditional *Miranda* custody determination so *Miranda* continues to stand as a safeguard against coerced and unreliable statements from children.[1]

1. Blanket consent for Amici is on file with this Court for all parties. No counsel for a party authored this brief in whole or in part. No person or entity, other than Amici, their members, or their counsel made a monetary contribution intended to fund for the preparation or submission of this brief.

IDENTITY OF AMICI CURIAE

I. Organizations

The Center on Wrongful Convictions of Youth (CWCY) is part of Northwestern University School of Law's Bluhm Legal Clinic and is a joint project of two of the Clinic's highly acclaimed Centers: the Children and Family Justice Center and the Center on Wrongful Convictions. The CWCY's unique mission is to uncover and remedy wrongful convictions of children, as well as to promote public awareness and support for nationwide initiatives – such as efforts to reduce juvenile false confessions and increase reliability in the juvenile court system – aimed at preventing future wrongful convictions. In so doing, the CWCY works with experienced juvenile law attorneys and wrongful conviction experts across the nation on a daily basis. The founder of the CWCY, Steven Drizin, has recently been cited by the United States Supreme Court as an authority on false confessions and wrongful convictions. *Corley v. U.S.*, 129 S. Ct. 1558, 1570 (2009) (stating that "there is mounting empirical evidence that these pressures [associated with custodial police interrogation] can induce a frighteningly high percentage of people to confess to crimes they never committed") (citing Steven A. Drizin and Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N. C. L. Rev. 891, 906-07 (2004)).

The Northeast Juvenile Defender Center, a regional affiliate of the National Juvenile Defender Center, is dedicated to providing access to and enhancing the quality of representation afforded

children charged with juvenile delinquency in New York, New Jersey, Pennsylvania, and Delaware. The Center, which is housed jointly at the Defender Association of Philadelphia, Rutgers Law School-Newark, and Rutgers Law School-Camden, provides training, back-up support, and other assistance to juvenile defenders throughout the region. The Center also works to promote effective and rational juvenile justice policy.

The Rutgers Urban Legal Clinic, one of the oldest law school clinical programs in the country, was established in 1970 to provide legal representation to clients in matters arising out of or affected by urban poverty. Among other matters, the Clinic assists clients in juvenile delinquency and post-conviction and parole proceedings, with a particular focus on those convicted of serious felonies as teenagers.

II. Individuals

Tamar Birckhead is an assistant professor of law at the University of North Carolina at Chapel Hill where she teaches the Juvenile Justice Clinic and the criminal lawyering process. Her research interests focus on issues related to juvenile justice policy and reform, criminal law and procedure, and indigent criminal defense. Licensed to practice in North Carolina, New York and Massachusetts, Professor Birckhead has been a frequent lecturer at continuing legal education programs across the United States as well as a faculty member at the Trial Advocacy Workshop at Harvard Law School. She is vice president of the board for the North Carolina Center on Actual Innocence and has been appointed to the executive council of the Juvenile

Justice and Children's Rights Section of the North Carolina Bar Association. Professor Birckhead received her B.A. degree in English literature with honors from Yale University and her J.D. with honors from Harvard Law School, where she served as Recent Developments Editor of the Harvard Women's Law Journal. She regularly consults on matters within the scope of her scholarly expertise, including issues related to juvenile justice policy and reform, criminal law and procedure, indigent criminal defense, and clinical legal education.

Andrew Block is the Director of the Child Advocacy Clinic at the University of Virginia School of Law. From 1998 to the spring of 2010 he was the founder and Legal Director of the JustChildren Program of the Legal Aid Justice Center, a program that represents low-income children across the Commonwealth of Virginia, and started and co-supervised the Child Advocacy Clinic at the Law School as an adjunct professor. He received various awards for his work at JustChildren including the American Bar Association Young Lawyer's Division Child Advocacy Award, the Virginia State Bar's Legal Aid Lawyer of the Year, and the Virginia Bar Association's Robert F. Shepherd, Jr. Award for excellence in child advocacy. He graduated from Northwestern University School of Law in 1994 and started his legal career at the Seattle-King County Public Defender's office where the majority of his time was spent representing youth. He has conducted trainings for judges, lawyers, parents and child-serving professionals across Virginia, and indeed the county, and worked extensively with state policy makers on matters impacting children living in poverty. He is a co-editor of Juvenile Law and Practice in Virginia (Virginia CLE).

Michele Deitch teaches juvenile justice and criminal justice policy as a Senior Lecturer at the University of Texas School of Law and the Lyndon B. Johnson School of Public Affairs. An attorney by training, she is considered one of the country's leading experts on the treatment of juveniles as adults. She recently produced a major report, Michele Deitch et al., From Time Out to Hard Time: Young Children in the Adult Criminal Justice System (2009), which addressed the unique challenges faced by children aged 14 and under who are treated as adults for criminal justice purposes. The report has received extensive national attention and was endorsed by the New York Times in a lead editorial. She also served on the Blue Ribbon Task Force on the Texas Youth Commission, which issued a report in 2007 with numerous recommendations for improving the Texas juvenile justice system, and she is often invited to testify before the Texas Legislature on these issues.

Frank Furstenberg is Professor of Sociology at the University of Pennsylvania and an Associate of the Population Studies Center. He has been the Chair of the MacArthur Network on Adult Transitions and serves as a Senior Research Fellow at Bocconi University and an Adjunct Fellow at the Public Policy Institute of California.

Furstenberg has authored, co-authored, and edited 12 books and more than 200 published papers on children, youth, families, and public policy. His most recent books are Frank Furstenberg, Destinies of the Disadvantaged: The Politics of Teen Childbearing (2007), and On the Frontier of Adulthood: Theory, Research, and Public Policy (Richard A. Settersten, Frank F. Furstenberg Jr.,

& Ruben G. Rumbaut eds., The University of Chicago Press 2005). He is a fellow in the Institute of Medicine, The American Academy of Arts and Sciences, and The American Academic of Political and Social Sciences. Furstenberg has been a board member of the Juvenile Law Center and currently serves on the board of Chapin Hall and The Stoneleigh Foundation. In 2008, Furstenberg received The Distinguished Career Award of the Society for Research on Adolescence.

Brandon L. Garrett is a professor of law at University of Virginia Law School. Garrett attended Columbia Law School, where he was an articles editor of the Columbia Law Review and a Kent Scholar. After graduating, he clerked for the Hon. Pierre N. Leval of the U.S. Court of Appeals for the Second Circuit. He then worked as an associate at Neufeld, Scheck & Brustin LLP in New York City, before joining the law school in 2005. His research and teaching interests include criminal procedure, wrongful convictions, habeas corpus, corporate crime, civil rights, civil procedure and constitutional law. His book, Brandon L. Garret, Convicting the Innocent: Where Criminal Prosecutions Go Wrong (Harvard University Press, forthcoming April 2011) examines what went wrong in the cases of the first 250 people to be exonerated by DNA testing.

Naomi E. Goldstein is Associate Professor of Psychology at Drexel University and former co-Director of the J.D.-Ph.D Program in Law and Psychology at Villanova Law School and Drexel University. She received her Ph.D. in Clinical Psychology from the University of Massachusetts, Amherst and completed a

clinical internship at the University of Massachusetts Medical School. Dr. Goldstein specializes in juvenile forensic psychology, and she conducts research on adolescents' comprehension of *Miranda* rights and their likelihoods of offering true and false confessions during police interrogations. Dr. Goldstein[2] co-authored the *Miranda Rights Comprehension Instruments*, the revised version of the *Instruments for Assessing Understanding and Appreciation of Miranda Rights*. Dr. Goldstein's research team also created the *Miranda Rights Educational Curriculum* and is evaluating its effectiveness in teaching youth about legal rights and legal decision-making. Dr. Goldstein has authored numerous articles and book chapters on juveniles' Miranda comprehension and waiver capacities, and she is co-author of two books, *Juvenile Delinquency* and *Evaluating Capacity to Waive Miranda Rights*. Dr. Goldstein's research has been funded by grants and contracts from the National Institute of Mental Health, American Psychology - Law Society, American Academy of Forensic Psychology, Drexel University's Institute for Women's Health, and Philadelphia Department of Human Services.

Paul Holland is Associate Dean for Academic Affairs and Associate Professor at Seattle University School of Law where he teaches in the school's Youth Advocacy Clinic. Prior to his appointment as Associate Dean, in August 2009, he served as Director of the Ronald A. Peterson Law Clinic, the School of Law's in-house clinical program. Dean Holland's practice, teaching, and policy

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2. Dr. Goldstein's texts reported above are on file with counsel of record.

expertise lie in the area of juvenile justice and children's rights. Before joining the faculty at Seattle University, he taught in clinics representing youth at the University of Michigan, Loyola University Chicago, and Georgetown University Law Center. He has published articles and led trainings for new and experienced juvenile lawyers and clinical teachers across the country. He was appointed by Governor Gregoire to the Governor's Juvenile Justice Advisory Committee in 2005. He served on the Committee through June 2009, the last year as Chair. He is the author of *Schooling Miranda: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 Loyola L. Rev. 39 (2006).

Richard A. Leo, Ph.D., J.D., joined the law faculty of the University of San Francisco in 2006, after a decade as a tenured professor of Psychology and Criminology at the University of California, Irvine. Dr. Leo is nationally and internationally renowned for his pioneering empirical research on police interrogation practices, the impact of *Miranda*, psychological coercion, false confessions, and wrongful convictions. Dr. Leo has authored more than 70 articles in leading scientific and legal journals as well as several books, including the multiple award-winning book Richard A. Leo, Police Interrogation and American Justice (Elizabeth Knoll ed., Harvard University Press 2008), which is considered the definitive study of police interrogation and confessions in America. Dr. Leo has won achievement awards for research excellence from many national organizations, including the Academy of Criminal Justice Sciences, the American Psychological Association, the American Academy of Forensic Psychology, and the American Sociological Association.

His research has been cited by numerous appellate courts, including the United States Supreme Court. He is regularly invited to lecture and present training sessions to lawyers, judges, police, forensic psychologists and other criminal justice professionals. Dr. Leo also has served as a litigation consultant and/or expert witness in hundreds of high-profile cases involving false confessions. Dr. Leo's work is often featured in the media; most recently, his work on behalf of the Norfolk Four was the subject of a story in *The New Yorker* in 2009.

Edward D. Ohlbaum is Professor of Law and Director of Trial Advocacy and Clinical Legal Education at Temple Law School. He was awarded the prestigious Richard S. Jacobson Award, given annually by the Roscoe Pound Foundation to one professor for "demonstrated excellence in teaching trial advocacy" in 1997. The architect of Temple's unique L.L.M. in Trial Advocacy, his programs have won awards from the American College of Trial Lawyers and the Committee on Professionalism of the American Bar Association. The author of three books, Professor Ohlbaum is a frequent speaker on evidence and advocacy at key international and domestic conferences. He serves on the Board of the Support Center for Child Advocacy and is actively involved in representing children in termination of parental rights cases. He is a former senior trial lawyer with the Defender Association of Philadelphia.

N. Dickon Reppucci received his Ph.D. in Clinical Psychology from Harvard in 1968. He subsequently taught at Yale as Assistant and Associate Professor (1968-1976) and was appointed Professor of Psychology

at the University of Virginia in 1976. Since then, he has served as Director of its Community Psychology program, which emphasizes law and children and diversity. He has received the Distinguished Contributions in Research Award from the Society for Community Research and Action (1998) and the American Psychology/Law Society Mentoring Award (2007). He is author or co-author of four books and more than 150 articles and book chapters, including Jessica Owen-Kostelnik, N. Dickon Reppucci & Jessica R. Meyer, *Testimony and Interrogation of Minors: Assumptions of Immaturity and Immorality*, 61(4) Am. Psychologist 286 (2006), which won the Society for Research on Adolescence Social Policy Award for Best Article in 2008. His current research foci include police perceptions of juvenile interrogations; aggressive, violent female juvenile offenders; violence in teen dating behavior; and teen competence to consent to sexual activity.

Jeffrey Shook is Assistant Professor of Social Work and Affiliated Assistant Professor of Law at the University of Pittsburgh. His research focuses on the juvenile and criminal justice systems and he has published on issues involving the administration of juvenile justice, juveniles in the criminal justice system, and the drift of young people from the child welfare system to the justice systems. Dr. Shook has also worked extensively to improve policies and practices involving young people caught up in the justice system. His interest in this case stems from his desire to ensure that legal frameworks account for differences between juveniles and adults.

SUMMARY OF ARGUMENT

The *Miranda* rule is an important safeguard that was designed to protect against coerced and unreliable statements. Indeed, this Court created the now famous *Miranda* warnings to counteract the "inherently compelling pressures" that define a police interrogation. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). These pressures have proven to be so powerful that they can "induce a frighteningly high percentage of people to crimes they never committed." *Corley v. United States*, 129 S. Ct. 1558, 1570 (2009). Recent empirical and social science research only confirm what was stated by this Court forty-three years ago: when it comes to children and young adolescents, there may be even more reasons to "distrust" interrogation-induced confessions. *See In re Gault*, 387 U.S. 1, 48-52 (1967); *see also* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 944-45 (2004), *cited in Corley, supra* (noting that 35 percent of 113 proven false confessions were made by individuals under the age of eighteen).

Where other briefs presented to this Court underscore why age must be a factor in the custody determination of *Miranda*, Amici submit this brief to emphasize that, if it is not, there will be an increase in uncounseled and potentially unreliable confessions from children. This is especially so in the context of an in-school interrogation, such as the one to which J.D.B. was subject, where children are already restricted in their freedom of movement and ordered to obey authority. *See* Paul Holland, *Schooling* Miranda: *Police Interrogation in the Twenty-First Century*

Schoolhouse, 52 Loy. L. Rev. 39, 85-86 (2006). To prevent such miscarriages of justice, the *Miranda* safeguards must be robust to assure that children understand their rights not to speak to the police.

ARGUMENT

Culminating earlier this year with the decision in *Graham v. Florida*, 560 U.S. ___, 130 S. Ct. 2011 (2010), this Court's jurisprudence has long recognized the common sense notion that children are different from adults and are in need of protections to account for those differences. Indeed, beginning with *Haley v. Ohio*, 332 U.S. 596 (1948) and continuing through *Gallegos v. Colorado*, 370 U.S. 49 (1962), and *In re Gault*, 387 U.S. 1 (1967), it has been understood that children are uniquely vulnerable to making coerced and unreliable statements during custodial interrogations. This case offers the Court an opportunity to ensure that children continue to benefit from the very safeguard it has long believed is necessary to dispel the coercion inherent in a custodial police interrogation: effective and timely warnings of the constitutional rights to silence and counsel.

Amici agree with the contention of J.D.B. and others groups filing supporting amicus briefs that age is an appropriate factor to be considered in determining whether J.D.B. was "in custody" for *Miranda* purposes. Adolescent developmental research and common sense tell us that children and teenagers are a class of individuals who lack the capacity and life experience to know that they have a right to refuse to speak to the police and to consult with an attorney when making such

life-altering decisions. While other briefs presented to this Court underscore the legal arguments as to why age must be a factor in the custody determination, we write separately to emphasize the practical results of omitting age from this calculus: an increase in false confessions and unreliable statements elicited from children by police in the stationhouse and the schoolhouse.

I. Juveniles, particularly those under the age of fifteen, are especially vulnerable to making false confessions and unreliable statements in response to police interrogation tactics like those used against J.D.B.

Empirical studies, developmental and behavioral research, police interrogation trainers, and this Court's decades-long juvenile jurisprudence recognize that juveniles are more likely than adults to respond to the pressures of custodial interrogation by falsely confessing to crimes they never committed. To protect children's liberty from unjustly being taken from them in this way, it is imperative that they receive the full benefit of available procedural safeguards. *See McNabb v. United States*, 318 U.S. 332, 347 (1943) ("The history of liberty has largely been the history of observance of procedural safeguards").

To be effective, a procedural safeguard must fit the threat to liberty posed by a given situation. The Court has the opportunity in this case to move one of those safeguards, the administration of *Miranda* rights to children, toward greater effectiveness by accounting for the special vulnerabilities of this class of accused. Doing

so will not only protect children's constitutional rights, but it will also mitigate the very real risk of unreliable statements – and, in turn, wrongful convictions – that is unavoidably present whenever children undergo the pressures of police interrogation. To prevent such miscarriages of justice, Amici urge this Court to adopt an objective test for the *Miranda* custody inquiry that includes a consideration of the youthfulness of the accused.

A. This Court created the *Miranda* rule to counterbalance the "inherently compelling pressures" present in any standard police interrogation and to mitigate the unreliable evidence and false confessions that these interrogations can produce.

This Court has long embraced the basic premise that police interrogations entail "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda v. Arizona*, 384 U.S. 436, 467 (1966); *see also Dickerson v. United States*, 530 U.S. 428, 435 (2000) (stating that "custodial police interrogation, by its very nature, isolates and pressures the individual"). "[C]ustodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." *Miranda*, 384 U.S. at 455. Accordingly, this Court established the now-famous *Miranda* warnings in 1966 to counteract that inherent coercion, under the view that the act of Mirandizing a suspect renders his constitutional rights to silence and counsel real and concrete – concepts that may otherwise

seem distant, abstract, and inaccessible to any frightened person, in an interrogation room, let alone a child without parent or counsel.

Custodial interrogations derive their coercive nature from the use of common and well intended – but psychologically manipulative and pressure-filled – interrogation tactics. *See Miranda*, 384 U.S. at 448-454 (discussing the psychological pressures exerted by commonly used police interrogation tactics); Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & Hum. Behav. 3-38 (2010), *available at* http://www.williams.edu/Psychology/Faculty/Kassin/files/White%20Paper%20-%201.HB%20(2010).pdf. Most police departments follow a standardized set of interrogation procedures known as the Reid Technique, named after the firm that markets the procedures to police departments around the country. *See* Fred E. Inbau, John E. Reid, Joseph P. Buckley, & Brian C. Jayne, *Criminal Interrogation and Confessions* (4th ed. 2004). Under the Reid Technique, police interrogators begin by separating the suspect from his family and friends, often isolating the suspect in a small interrogation room specially designed to increase his anxiety and incentive to escape. Kassin, 34 L. & Hum. Behav. at 7. In the first stages of the interrogation, the questioners deploy a series of tools intended to shake the suspect's adherence to his claim of innocence. They repeatedly accuse the suspect of lying, refuse to listen to his claims of innocence, and exude unwavering confidence in his guilt. *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 Denv. U. L. Rev. 979, 990 (1997). Police interrogators

also often inform a suspect that they possess physical evidence implicating him – fingerprints on a murder weapon, for example, or the statement of an eyewitness – even if such evidence does not actually exist. *See id.* This stage continues until the suspect feels thoroughly hopeless and trapped. *See id.*

After this is accomplished, police interrogators then switch to the second stage of interrogation by offering the suspect a way out of his predicament: confession. To communicate this message, they indicate that the benefits of confessing will outweigh the costs of continued resistance and denial. *See id.* Interrogators frequently minimize or rationalize the suspect's involvement in the crime, for instance, by telling the suspect that he must have been merely a witness or that the criminal act must have been unintentional, a mere accident, or an act of justifiable self-defense, all in an effort to make confessing seem less damaging. Steven A. Drizin & Richard A. Leo, *The Problem of False Confession in the Post-DNA World*, 82 N.C. L. Rev. 891, 916 (2004). They also assure the suspect that confessing is in his best interest and imply that he will receive lenience if he confesses. *See id.* By deploying these tactics at the right psychological pressure points, experienced interrogators can be extraordinarily effective in causing a suspect to produce self-incriminating information.

Sometimes, however, these potent tactics become far too effective: the psychological tricks and subtle coercion of custodial interrogation can cause not only the guilty, but also the innocent, to confess. To date, 261 individuals have been exonerated on the basis of DNA testing after having been convicted of crimes that

they did not commit, and approximately one-quarter of those individuals falsely confessed to the crimes in question under police interrogation.[3] *See* The Innocence Project, Understand the Causes: False Confessions / Admissions, http://www.innocenceproject.org/understand/False-Confessions.php (last visited Dec. 7, 2010). Police recognize the incidence of false confessions too. In a 2007 survey, law enforcement officers estimated that about 10 percent of all interrogations result in false confessions. Jessica R. Meyer & N. Dickon Reppucci, *Police Practices and Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility*, 25 Behav. Sci. & L. 757, 770 (2007). These false confessions, in turn, lead to the wrongful prosecution and incarceration of the innocent, while the guilty remain at large. *See* Drizin & Leo, 82 N.C. L. Rev. 891 (examining 125 proven false confessions in the United States and concluding that 81 percent of false confessors whose cases went to trial were wrongfully convicted).

In recognition of this long-standing reality, this Court noted more than 40 years ago that the "heavy toll" of custodial interrogation has been known to result in false confessions. *Miranda*, 384 U.S. at 455, fn. 24. Last year, this Court continued to acknowledge the gravity of the problem, finding that "there is mounting

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3. This statistic does not include false confessors who have been exonerated on the basis of non-DNA evidence or false confessors who have yet to be exonerated. To date, scholars have uncovered at least 250 false confessions made over the last twenty years, and there are likely a great many more individuals who have falsely confessed whose stories are simply not known. *See* Richard A. Leo, *Police Interrogation and American Justice* 243 (2008).

empirical evidence that these pressures [associated with custodial police interrogation] can induce a frighteningly high percentage of people to confess to crimes they never committed." *Corley v. United States*, 556 U.S. ___, 129 S. Ct. 1558, 1570 (2009) (citing Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 907 (2004)).

Finally, the pressures of custodial interrogation pose a threat not only to the constitutional right to be free from coercion but also to public safety. When innocent people who falsely confess are wrongfully convicted, the real perpetrators are left on the street to continue their criminal activities or harm society.

B. Youthful suspects are particularly susceptible to react to the "inherently compelling pressures" of police interrogation by making false confessions.

Standard police interrogation tactics – which in all probability were designed with the hardened adult suspect in mind – are frequently deployed against far softer targets: children and adolescents. *See, e.g.*, Jessica R. Meyer & N. Dickon Reppucci, *Police Practices and Perceptions Regarding Juvenile Interrogation and Interrogative Suggestibility*, 25 Behav. Sci. & L. 757 (2007). Despite their common use during interrogations of children, however, these tactics pose a particular risk to youthful suspects.

This Court's jurisprudence has long recognized that children are especially likely to react to the unavoidably coercive pressures of interrogation by falsely confessing.

In *Haley v. Ohio*, 332 U.S. 596, 599-600 (1948), this Court suppressed a fifteen-year-old boy's confession given during a police interrogation, because a youth – an "easy victim of the law" – could easily succumb to coercion during the police interrogation process if he were left without adequate protections: "That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." *Id.* at 599. Fourteen years later, in *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962), this Court again suppressed a boy's confession, this one given almost immediately after he had been taken into custody: "[A] 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. . . . [W]e deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights." *Id.*

Significantly, this Court affirmed that the privilege against self-incrimination protects children in juvenile court in the case of *In re Gault*, 387 U.S. 1, 42-57 (1967). In so doing, this Court explained that "common observation and expert opinion" both compel the conclusion that one should "distrust" the interrogation-induced confessions of children and young adolescents. *Id.* at 48 (citing 3 Wigmore, Evidence § 822 (3d ed. 1940)). This Court continued by plainly stating: "[A]uthoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children." *Id.* at 52.

More recent precedent from this Court only reinforces the conclusion that juveniles are uniquely susceptible to making unreliable statements during the pressure-cooker of police interrogation. In light of the developmental cognitive differences between youth and adults, this Court recently outlawed both the juvenile death penalty and juvenile life without parole for non-homicide offenses. *See Roper v. Simmons*, 543 U.S. 551, 569 (2005); *Graham*, 130 S. Ct. at 2026. In so holding, this Court found that children are more vulnerable than adults to the application of external pressure: they are suggestible, impulsive, eager to please authority figures, and hampered by immature decision-making. *Roper*, 543 U.S. at 569; *Graham*, 130 S. Ct. at 2026, 2032. These same traits make juveniles particularly ill-suited to engage in the high-stakes risk-benefit analysis inherent in any police interrogation. Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & Hum. Behav. 3-38 (2010); *see also* Thomas Grisso et. al, *Juveniles' Competence to Stand Trial: A Comparison of Adolescents and Adults Capacities as Trial Defendants*, 27 Law & Hum. Behav. 333, 353-56 (2003) (noting that children fifteen years or younger are more likely than older teenagers to comply with authority and confess to an offense). Even the marketers of the Reid Technique have agreed that juveniles are at higher risk for false confessions than adults and advise interrogators to exercise "extreme caution and care" when interrogating them. John E. Reid & Associates, Inc., Critics Corner, http://www.reid.com/educational_info/criticfalseconf.html (last visited Dec. 7, 2010).

Empirical studies of false confessions further illustrate the heightened risk of false confessions from youth. The leading study of 125 proven false confessions that was cited by this Court in *Corley* found that 63 percent of false confessors were under the age of 25 and 35 percent were under 18. Drizin & Leo, 82 N.C. L. Rev. at 945. By way of comparison, juveniles make up only eight percent of individuals arrested for murder and 16 percent of individuals arrested for rape in the United States. *See* Howard N. Snyder, *Juvenile Arrests 2004*, U.S. Dep't of Just. Off. of Juv. Just. and Delinq. Prevention, Off. Just. Programs (Dec. 2006). In another respected study of 340 exonerations that have taken place since 1989, researchers found that juveniles under the age of 18 were three times as likely to falsely confess as adults; a full 42 percent of juvenile exonerees had falsely confessed, compared to only 13 percent of wrongfully convicted adults. Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95(2) J. Crim. L. & Criminology 523, 523-53 (2005).

Yet another study revealed that juveniles between the ages of 12 and 16 years old were far more likely to falsely confess than young adults between the ages of 18 and 26 years old; astonishingly, a majority of the juvenile participants in that study complied with a request to sign a false confession without uttering a word of protest. *See* Allison D. Redlich & Gail S. Goodman, *Taking Responsibility For an Act Not Committed: Influence of Age and Suggestibility*, 27 L. & Hum. Behav. 141, 150-51 (2003). And the most recent study addressing the subject – an examination of 103 wrongful convictions of factually innocent teenagers and

children – found that a false confession contributed to 31.1 percent of the juvenile cases studied, as compared against only 17.8 percent of adult wrongful convictions. Joshua A. Tepfer, Laura H. Nirider & Lynda Tricarico, *Arresting Development: Convictions of Innocent Youth*, 62 Rutgers. L. Rev. 887, 904 (2010). The younger the accused, the more likely he or she was to falsely confess. *Id.* at 904-05. The study similarly found that youth are also particularly likely to respond to the pressures of interrogations by offering false information against another person; in over half of the cases studied, a demonstrably false statement made by a youth contributed to the wrongful convictions, whether that statement implicated himself or another person. *Id.* at 905-10.

The problems of youthful immaturity and inexperience, of course, are compounded when the youth being interrogated also has cognitive or intellectual disabilities, as J.D.B. does. *See Atkins v. Virginia*, 536 U.S. 304, 320 (2002) (finding unconstitutional the practice of executing people with mental retardation, in part because those individuals are particularly prone to make false confessions). People with mental impairments tend to rely on authority figures for solutions to problems, to want to please persons in authority, to seek out friends, to feign competence or knowledge, to exhibit a short attention span, to experience memory gaps, to lack impulse control, and to accept blame for negative outcomes. *See* Robert Perske, *Understanding Persons With Intellectual Disabilities in the Criminal Justice System: Indicators of Progress?*, 42 Mental Retardation 484, 484-87 (2004).

It is not difficult to understand why someone with a combination of these traits is likely to confess falsely. One certainly need not be mentally impaired, though, in order to be vulnerable to the "inherently compelling pressures" of police interrogation. It is enough simply to be young and scared.

In spite of judicial, medical, psychological, social science, and even law enforcement recognition of the susceptibility of juveniles to interrogation-induced false confessions, police officers routinely fail to take these differences into account in the interrogation room. *See e.g.*, Meyer & Reppucci, 25 Behav. Sci. & L. at 757. Instead, officers routinely interrogate juveniles using the same tactics they use on adults. Allison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 Rutgers L. Rev. 943, 952 (2010). As these tactics continue to be used, false confessions of juveniles, such as the ones described below, will continue to occur.

1. Levi Dunn's False Confession[4]

On February 20, 2008, Levi Dunn, a twelve-year-old student from Creswell, Oregon, confessed to shooting and killing a dog with his pellet gun. Levi confessed during an interrogation that took place in the office of Creswell Middle School Principal Shirley Burns and

4. The information from this narrative comes from the following article: Karen McCowan, *Lawsuit Alleges False Confession of Boy*, The Register Guard, Feb. 24, 2010, at A1, *available at* http://special.registerguard.com/csp/cms/sites/web/news/cityregion/24490071-41/levi-suit-lawsuit-alleges-dog.csp

outside the presence of his parents. Present during the interrogation were Pat O'Neill, a deputy sheriff from the Lane County Sheriff's Office, Principal Burns, and Will Davey, a campus supervisor at the school. According to a since settled civil lawsuit later filed by Levi's father against the school district,[5] Levi became a suspect when a deputy noticed a gun leaning against the back of Levi's house during a canvas of the neighborhood where the shooting took place. The lawsuit also alleges that Levi repeatedly denied involvement in the shooting, even agreeing to "pinkie swear" to Deputy O'Neill, but O'Neill would not take no for an answer and pressed Levi until he confessed. Charges were later dropped when the state police determined that the pellet recovered from the dog's body could not have been fired from Levi's gun.

2. *Romarr Gipson and Elijah Henderson's False Confessions*[6]

On July 27, 1998, eleven-year-old Ryan Harris disappeared during a bike ride in her neighborhood on the South Side of Chicago. Her body was found the next day behind a house among some weeds and shrubs. She had been badly beaten and her underwear had been

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5. Karen McCowan, *District Settles Its Part of* Suit, The Register *Guard*, Dec. 21, 2010, *available at* http://www.registerguard.com/csp/cms/sites/web/updates/25689197-55/neill-county-creswell-levi-case.csp.

6. The information in this narrative comes from Alex Kotlowitz,"The Unprotected," The New Yorker, Feb. 8, 1999, in *True Stories of False Confessions*, 175-92 (Rob Warden and Steven A. Drizin, eds., Northwestern University Press 2009) (adapted with permission).

ripped off and shoved into her mouth. Based on a tip that two neighborhood boys had thrown rocks at Ryan the day before her disappearance, Chicago police, on August 9, 1998, brought eight-year-old Elijah Henderson and his seven-year-old friend, Romarr Gipson, into the station for questioning.

Before speaking with the boys, detectives secured the permission of their parents, who also agreed to remain outside the room during the questioning. Elijah was questioned first. He told police that Romarr had brought him to Harris' body right after it was discovered and that Harris had been naked with something in her mouth. The detectives then moved on to Romarr. Before interrogating him about the murder, they told Romarr that good boys only spoke the truth and inquired if he was a good boy. "Each detective took one of Romarr's hands, and they told him they were his friends and asked if he'd taken his friend to Harris' body." Immediately thereafter, according to the police report:

> Romarr said in essence without further questioning . . . that he and Elijah were playing throwing rocks when they saw Ryan Harris riding her bicycle. Romarr said he threw a rock, hitting the girl in the head and knocking her off her bike. After she fell off the bicycle, she wasn't moving, so he and Elijah each took one of the girl's arms and moved her into the weeds by the railroad tracks. He said "someone must have come and taken the bike, because he never saw it again."

The detectives then went and spoke with Elijah, who – after being told Romarr's story was different from his – changed his story to confirm Romarr's description.

Four weeks after the boys were arrested, the charges against them were dropped because semen was found on Harris' panties. Medical experts had advised law enforcement that the possibility of semen coming from seven- and eight-year-olds was "highly remote." They were right. The boys were exonerated when DNA evidence matched Floyd Durr, an adult repeat sexual predator who had been free at the time of the crime.

C. The *Miranda* procedural safeguard is one of several essential protections against juvenile false confessions, particularly in the school setting where youth are unlikely to understand that they are permitted to decline to speak with police.

While *Miranda* by itself does not solve the problem of false confessions, it is one important safeguard that was designed to protect against coerced and unreliable statements. Given that children are particularly susceptible to falsely confessing during police interrogations generally, it would be folly to define custody in a way that enables police to question children without the benefit of *Miranda* in the quasi-custodial setting of a school. Instead, just as age is a factor considered in determining voluntariness under the *Miranda* totality of the circumstances test, *see Gallegos*, 370 U.S. at 52-53, it should also be a factor in the *Miranda* custody determination.

Miranda warnings are, if anything, particularly essential in a public school setting where the government is entrusted with the care of the child. *See Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995). Children are required by law to attend school; they are restricted in their freedom of movement throughout the school; and they are more likely to be intimidated by authority than young adults. Paul Holland, *Schooling* Miranda: *Police Interrogation in the Twenty-First Century Schoolhouse*, 52 Loy. L. Rev. 39, 85-86 (2006). Against such a context, a thirteen-year-old student such as J.D.B. would have no reason to think that he has any right to defy his questioner by refusing to talk, to freely leave the room, or to demand the assistance of counsel when a police officer confronts him at school, unless he is specifically so told. Students do not have the right to walk out of a meeting with a principal, vice-principal, or other school officials regardless of whether it is a police interrogation. Given research on age-related suggestibility and deference to authority figures, it is certainly reasonable that a student would fail to understand his right to leave a meeting with a school authority figure. Given that police and public safety authorities often serve in a variety of roles within schools (including security officials, investigators, and probation officers), it is difficult for a youth to differentiate when he can leave a meeting with a police officer/security personnel without exposing himself to punishment.

Questions surrounding the constitutional implications of schoolhouse interrogations have taken on increased importance as law enforcement presence in schools has increased. School resource officers

number approximately 17,000 nationwide today, compared against just 2,000 fifteen years ago. Lisa H. Thurau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y.L. Sch. L. Rev. 977, 978 (2009-2010); Josh Kagan, *Complexity of School-Police Relationships Challenge "Special Needs" Doctrine*, 19 A.B.A. Crim. Just. 36, 37 (2005). During the 2003-2004 school year, over 70 percent of students between the ages of twelve and eighteen reported some police presence at their school, which represented an increase of almost 30 percent from 1999. Peter Price, *When is a Police Officer an Officer of the Law?: The Status of Police Officers in Schools*, 99 J. Crim. L. & Criminology 541, 548 (2009) (citing National Center for Education Statistics, Indicators of School Crime and Safety, 63 fig.21.1 (2005)). Increasingly, school resource officers have assisted police with investigation of crimes that occur off-campus, including interrogations of child suspects. *See* Meg Penrose, *Miranda, Please Report to the Principal's Office*, 33 Fordham Urb. L. J. 775, 786 (2006). Giving officers *carte blanche* to confront suspected juveniles at school – the one place where children would have no logical reason to believe that they could leave or decline to answer an officer's questions – is an impermissible end run around juveniles' constitutional rights.

At the same time, requiring officers to account for age as part of the *Miranda* custody determination puts no additional burden on police officers, as they must already account for age during the interrogation process. Many states require or allow parental presence or notification during an interrogation, warnings to a juvenile about the right to have a parent present during

the interrogation, parental consent in waiving *Miranda*, or even the right to counsel for some juveniles prior to a custodial interrogation. Brief for Petitioner, *J.D.B. v. North Carolina*, No. 09-11121 (filed Dec. 16, 2010); *see also* W. Va. Code § 49-5-2(l) (uncounseled statements made by juveniles under the age of fourteen are inadmissible); 705 Ill. Comp. Stat. § 405/5-170 (children under the age of thirteen must have the presence of counsel during any interrogation of a sexual assault or murder). In the context of this case – where the interrogation was conducted in a middle school – the suspect's minority status was a certainty. *See generally* Paul Holland, *Schooling* Miranda: *Police Interrogation in the Twenty-First Century Schoolhouse*, 52 Loy. L. Rev. 39, 85 (2006).

CONCLUSION

At thirteen years of age, J.D.B. is one of the youngest litigants in the history of United States Supreme Court criminal jurisprudence. This Court has always viewed juveniles, even ones without intellectual disabilities, as vulnerable to falsely confessing in the face of the inherent pressures of custodial police interrogations. To ensure that innocent youth are protected from incriminating themselves and that law enforcement purposes are met, the *Miranda* safeguards must be robust. Amici accordingly request that this Court acknowledge that the *Miranda* custody determination should include a commonsense consideration of the suspect's age and reverse the decision of the North Carolina Supreme Court.

Respectfully submitted.

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J.D.B.,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

On Writ of Certiorari to the Supreme Court of North Carolina

BRIEF OF INDIANA, ALABAMA, ARKANSAS, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, GUAM, HAWAII, IDAHO, ILLINOIS, IOWA, KENTUCKY, LOUISIANA, MAINE, MICHIGAN, MONTANA, NEBRASKA, NEVADA, OHIO, OKLAHOMA, PENNSYLVANIA, PUERTO RICO, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WASHINGTON, AND WYOMING AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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Question Presented

Must a court consider the age of a juvenile in determining whether he is "in custody" for purposes of *Miranda v. Arizona*?

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Interest of *Amici* States

The *amici* States are the front lines of the nation's criminal investigations and are virtually solely responsible for juvenile justice. As such, States, their law enforcement officers, and their courts are primarily entrusted with implementation of this Court's decisions in *Miranda v. Arizona* and its progeny. The States, therefore, have a unique interest in a clear, informed, and—above all—fair body of constitutional law regarding the interactions between law enforcement and the citizenry. The States have a strong interest in promoting policies that strike a reasonable balance among three competing concerns created by this case: law enforcement's need to question juveniles appropriately, the burden placed on police by special and complex rules, and desire to protect juvenile rights in interactions with law enforcement.

To that end, the *amici* States urge the Court to resist expanding the custody inquiry and instead to reaffirm the well-established and understood rules for testing *voluntariness* as the most effective avenue to adjudicate whether and how a person's age affected statements to police.

Summary of Argument

Custody, for *Miranda* purposes, has always been assessed through an objective standard that looks to the circumstances of the interrogation but does not take into account personal characteristics of the interviewee even if those characteristics might impact the person's subjective perception of his

freedom. Subjective factors such as experience and intelligence are often unknown to police officers. Regardless, police are ill-equipped to make snap assessments as to how age (or other factors that cannot be meaningfully distinguished from age) will impact a person's belief that he is free to leave.

Age is not an effective proxy for assessing custody because it is shorthand for these other subjective matters that are supposed to be irrelevant to the analysis. A situation that is objectively non-custodial does not become custodial simply because the age of the subject changes. Moreover, age does not need to be used as a proxy for location in juvenile-police interactions that occur at school. The location of the interrogation is a factor that is considered in the custody analysis; thus, the school environment properly may be considered in the custody analysis without regard to consideration of age.

Age and maturity are already facts relevant in assessing the voluntariness of a statement, and courts are better suited to examine subjective considerations in the voluntariness context. Many states provide additional protections for juveniles subjected to interrogation, but those protections almost uniformly only apply to juveniles who are clearly in custody. The existence of these protections is irrelevant to assessing whether the juvenile is in custody, and states generally have not enacted measures defining custodial status based on age. Expanding *Miranda* custody to subsume subjective considerations that are already accounted for by the

voluntariness analysis will thus result in additional confusion for police officers and costs to society without resulting in any offsetting benefit to society.

Argument

I. Determining Whether an Interrogation is Custodial has Always Depended Upon Objectively Discernible, Even Obvious, Circumstances

Recently, in *Yarborough v. Alvarado*, the Court explained that none of its decisions have permitted courts to weigh subjective considerations, such as the significance of a person's age, when determining whether a person is "in custody" for purposes of determining whether *Miranda* warnings are necessary. 541 U.S. 652, 666-67 (2004). The Court therefore rejected, in the habeas context, the argument that a requirement that police consider a witness's age when deciding whether to administer *Miranda* warnings is a "clearly established" Fifth Amendment safeguard.

Quite to the contrary, for nearly 45 years the Court has held to the position that *Miranda v. Arizona* applies only when, as a matter of objectively discernible fact, police arrest a subject or authorities "otherwise deprive[] . . . his freedom . . . in any significant way." 384 U.S. 436, 478 (1966). That standard does not contemplate that *Miranda* warnings must be given where, even though objective evidence indicates the subject is free to leave, his subjective perceptions (owing to minority

age or other individual characteristics) tell him something else.

The purpose of the *Miranda* rule is to ensure that suspects know of the privilege against self-incrimination when being interrogated incommunicado. *Id.* at 445-458 (recounting the methods, purposes, and dangers of modern interrogation techniques). "That atmosphere is said to generate 'inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.'" *Illinois v. Perkins*, 496 U.S. 292, 296 (1990) (quoting *id.* at 467). It is that "intimate connection between the privilege against self-incrimination and police custodial questioning" that requires special procedures to ensure protection of a person's Fifth Amendment rights. *Miranda*, 384 U.S. at 458; *see Dickerson v. United States*, 530 U.S. 428, 434-35 (2000).

But the Court has steadfastly defined "custody" for *Miranda* purposes to mean only arrest or its functional equivalent, as determined by objectively discernible circumstances. "The initial determination of custody depends on the objective circumstances of interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California*, 511 U.S. 318, 323 (1994) (per curiam). Courts examine the entirety of "'the circumstances surrounding the interrogation'" and determine "'how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her

freedom of action.'" *Id.* at 322, 325. "Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve 'the ultimate inquiry': 'was there a formal arrest or restraint of freedom of movement of the degree associated with a formal arrest.'" *Thompson v. Keohane*, 516 U.S. 99, 112 (1995) (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam)); *see also Yarborough*, 541 U.S. at 664-65; *Dickerson*, 530 U.S. at 444; *Stansbury*, 511 U.S. at 326; *Perkins*, 496 U.S. at 296-97; *Berkemer v. McCarty*, 468 U.S. 420, 434-35, 439-40 (1984); *Minnesota v. Murphy*, 465 U.S. 420, 431-33 (1984); *Oregon v. Mathiason*, 429 U.S. 492, 494-95 (1977) (per curiam); *Beckwith v. United States*, 425 U.S. 341, 347 (1976); *Mathis v. United States*, 391 U.S. 1, 4-5 (1968).

This rule ensures that police need not "'gues[s] as to [the circumstances] at issue before deciding how they may interrogate the suspect.'" *Yarborough*, 541 U.S. at 667 (quoting *Berkemer*, 468 U.S. at 431). "Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated." *Berkemer*, 468 U.S. at 437.

Petitioner and his *amici* invite the Court to depart from these precedents and the doctrinal underpinnings that justify the *Miranda* rule by requiring for the first time that a subjective circumstance—a person's immaturity—be considered in determining whether custody exists. While the

question of a person's age seems objective (though without documentary proof even an educated guess is subjective), the actual consideration that Petitioners urge is the relative ability of the person being interrogated to reason and make intelligent judgments about whether to speak, and what to say, to police. A juvenile's maturity, intelligence, experience, and sophistication have nothing to do with "the objective circumstances of interrogation" but are rather "the subjective views harbored by . . . the individual being questioned." *Stansbury*, 511 U.S. at 323.

Nor do considerations of age and maturity represent the logical end of Petitioner's suggested subjective inquiry. Lower courts have already begun considering other subjective factors that do not inform the traditional custody determination. *See, e.g., Alvarado v. Hickman*, 316 F.3d 841, 847-49 (9th Cir. 2002) (evaluating whether custody existed by reference to the subject's experience with police), *rev'd by Yarborough*, 541 U.S. 652; *In re Jorge D.*, 43 P.3d 605, 608 (Ariz. Ct. App. 2002) (requiring consideration of age, maturity, and experience); *State v. Doe*, 948 P.2d 166, 173 (Idaho Ct. App. 1997) (same); *In re Joshua David C.*, 698 A.2d 1155, 1162 (Md. Ct. Spec. App. 1997) (holding that in the juvenile context courts must "apply a wider definition of custody" that includes "additional factors, such as the juvenile's education, age, and intelligence"). If a subject's age and maturity is relevant to the custody determination, there is no apparent principled reason not to consider other circumstances affecting individual perceptions such

as experience with police, intelligence, education, mental health, and parental support. None of these are objectively discernible or necessarily apparent to police and would become fodder for motions to exclude evidence on *Miranda* grounds. For that matter, even apparently non-custodial interrogations of adults might be subject to second-guessing based on later revealed questions of experience, intelligence, or developmental disabilities.

To muddy the custody waters with subjective judgments about a person's emotional, intellectual, and experiential sophistication would be to create an unworkable rule for police to administer—precisely the opposite result the Court avers that the *Miranda* rule represents. *See New York v. Quarles*, 464 U.S. 649, 658 (1984) (*Miranda* recognizes "the importance of a workable rule to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."); *see also Yarborough*, 541 U.S. at 668-69 ("[T]he custody inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect's individual characteristics-including his age-could be viewed as creating a subjective inquiry."). Law enforcement officers cannot reliably know an individual's state of mind, background, cognitive ability, or the host of other individual characteristics that could bear on a person's perception of custody. *Yarborough*, 541 U.S. at 668. Fair and effective law enforcement requires a clear and objective rule of custodial interrogation.

In this regard, there is no point in substituting age as a stand-in for location when it comes to interactions between juveniles and law enforcement that occur *at school*, contrary to Petitioner's and his *amici's* implicit suggestion. Location of the interview has always been a factor considered in the custody determination. *See, e.g., Yarborough*, 541 U.S. at 665 (noting that Alvarado had been interviewed at the police station). That the interview took place on school grounds is a legitimate objective factor that plays into the custody determination. Depending on the circumstances of the school, this factor may weigh in favor of custody or against it.[1] Many, if not all, of the purportedly coercive elements of the interview here—such as Petitioner's inability to leave school grounds, obligation to follow school rules, and the presence of the principal in his interview—arise from the location of the interview on school grounds rather than from the age of the juvenile.

Put another way, there does not appear to be a suggestion that if the same interview in this case

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[1] The compulsory nature of attendance does not automatically render students to be "in custody" for *Miranda* purposes. *See, e.g., United States v. Crossley*, 224 F.3d 847, 861 (6th Cir. 2000) (holding that a suspect was not in custody when she was unexpectedly summoned to her military superiors' administrative office and ordered to go to a room where she was confronted by two FBI agents); *Commonwealth v. Eichinger*, 915 A.2d 1122, 1135 (Pa. 2007) (finding a suspect not to be in custody at his place of employment).

had occurred in front of Petitioner's house, his age would have made the interaction custodial. If that much is conceded, it becomes clear that the inquiry about custody in this case should focus on the impact of the school setting—an obvious factor easily evaluated by officers—rather than the subject's age or maturity.

Petitioner's approach would defeat the goal of a prophylactic rule easily applied by law enforcement in the field. Neither Petitioner nor his *amici* offer a "compelling justification" to depart from the "simplicity and clarity" of *Miranda*'s holding. *Berkemer*, 468 U.S. at 432.

II. Age and Maturity are Proper Considerations for Determining *Voluntariness*, not Custody-in-Fact

Fifth Amendment doctrine has already created a way for courts to evaluate whether a declarant's age should preclude the admissibility of statements to police: the baseline requirement that confessions be voluntary. That is, regardless whether the police have provided *Miranda* warnings, for a self-incriminating statement to police to be admissible, it must be given voluntarily. *See Dickerson*, 530 U.S. at 444 ("The requirement that *Miranda* warnings be given does not, of course, dispense with the voluntariness inquiry."). Courts must consider the totality of the circumstances when evaluating whether a witness gave a statement to police

voluntarily, regardless of whether the witness was in custody at the time. *Gallegos v. Colorado*, 370 U.S. 49, 53-54 (1962); *see generally Haley v. Ohio*, 332 U.S. 596 (1948).

Courts are well-equipped to make such determinations that require a range of background information to make a deliberative decision. In contrast, law enforcement officers are required to make quick decisions, often based on the limited information before them in the interrogation context. Presumably, this is why the Court has "emphasized the virtues of a bright-line rule" flowing from *Miranda*. *Arizona v. Roberson*, 486 U.S. 675, 681 (1988). Therefore, the circumstances that have traditionally been used to determine custody are significantly different from age in that they look to the environment of the interaction between a person and a law enforcement officer, not the subjective faculties of the witness. *See Yarborough*, 541 U.S. at 667-68.

Age is not an effective proxy for restraint when determining custody because it is not a factor that may be easily evaluated by law enforcement officers in the field. Age may or may not correspond with maturity, intelligence, or sophistication. Determining the effect of age on a person is a complicated undertaking often requiring information from family, friends, educators, doctors, and others. Police cannot reliably know within the first moments of interaction with a person if age is indicative of

relative maturity, intelligence or sophistication.[2] Indeed, some juveniles and adolescents are particularly sophisticated while some adults are decidedly not. *C.f. Sensback v. State*, 720 N.E.2d 1160, 1164 (Ind. 1999) ("There are cunning children and there are naïve adults.").

Determinations about voluntariness, however, are not made on-the-spot by police the way decisions about the need for *Miranda* warnings are. When required, police give *Miranda* warnings before questioning suspects, but they do not stop confessions mid-stream over concerns about voluntariness. The system depends on courts to address such concerns, and evidence concerning an individual's personal characteristics may be

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[2] In fact, many courts that have considered age in the determination of custody have provided law enforcement with no guidance on *how* age affects the determination. *See, e.g., United States v. Erving L.*, 147 F.3d 1240, 1248 (10th Cir. 1998) (relying on a "reasonable juvenile" standard without explaining how it differed from a "reasonable adult" standard); *State v. Smith*, 546 N.W.2d 916, 923 (Iowa 1996) (holding it appropriate to consider age as a factor in determining custodial status without explaining how it should be considered); *In re Dalton B.B.*, 61 A.D.3d 1105, 1106 (N.Y. App. Div. 2009) (stating, without elaboration, that a "reasonable 15-year-old would have believed that his freedom was significantly restricted."); *In re L.M.*, 993 S.W.2d 276, 289 (Tex. App. 1999) (asking whether "a reasonable child of the same age would believe her freedom of movement was significantly restricted" without giving guidance as to what a "reasonable child" is).

presented to the court at length. Courts therefore have more information and can make a more deliberative decision about maturity and intelligence than police can at the moment of questioning. Police need clear and objective rules to use in the field, while more nuanced and complex rules can be employed by the courts.

Miranda itself identified the incommunicado nature of a stationhouse interrogation. *See Miranda*, 384 U.S. at 475-76. In a custodial situation, the person is confined without the ability to contact anyone for help and is at the mercy of law enforcement. The location of the interview, restraints on the person's movement, the number of officers, the size of room, and what the person is told by law enforcement all bear upon whether a reasonable person placed in that circumstance would feel a strong, almost overwhelming coercion to comply with whatever law enforcement asks. In this environment, in order to ensure the person knows that he may still resist law enforcement, the Court put the protections of *Miranda* in place. *See id.* at 476-79.

When a person is told that he is under arrest, handcuffed, and taken by police to the stationhouse, that person is in custody and it does not matter whether the person is 15 years old or 65 years old. *See Beheler*, 463 U.S. at 1125 ("Although the circumstances of each case must certainly influence a determination of whether a suspect is 'in custody' for purposes of receiving of Miranda protection, the ultimate inquiry is simply whether there is a "formal

arrest or restraint on freedom of movement" of the degree associated with a formal arrest."). Conversely, when a person is approached by a police officer in a public place and engaged in conversation, that person is not in custody and it does not matter whether the person is 15 years old or 65 years old. *See, e.g., Florida v. Royer*, 460 U.S. 491, 498 (1983) ("[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions."). Age does nothing to illuminate whether the circumstances surrounding the interview constitute *custody*.

III. States Typically Afford Special Protections to Juveniles Only *After* They are Clearly In Custody, not for Purposes of Determining *Whether* they are in Custody

Many states provide special protections for juveniles that adults do not receive, but in almost every state, those protections apply only once the juvenile is taken into custody or subjected to custodial interrogation.[3] That is, when juveniles are

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[3] Some of the state statutes cited by Petitioner and his *amici* do not provide any additional protection for juveniles at all, but simply provide that any statement

placed in an inherently coercive environment and control of their basic liberties is placed in the hands of law enforcement, states afford additional protections to prevent their will from being overborne. But these protections are triggered *by* unquestioned custody; they do not provide special treatment for determining when custody exists. State procedures applying to juveniles who are in custody simply are not relevant to deciding whether those juveniles are in custody, which is the issue presented in this case.[4]

Many states require prompt parental notification whenever a child is taken into custody. *See, e.g.*, Alaska Stat. § 47.12.250; Fla. Stat. § 985.101; Ga. Code Ann. § 15-11-47; Haw. Rev. Stat. § 571-31; Idaho Code § 20-516; Iowa Code § 232.19; Me. Rev. Stat. tit. 15, § 3203-A(2); Minn. Stat. § 260B.176; Miss. Code Ann. § 43-21-303(3); Mont. Code Ann.

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that would be constitutionally inadmissible in an adult criminal proceeding is inadmissible against a juvenile, thereby applying the same standards to both juvenile and adult custodial interrogations. *See, e.g.*, Ga. Code Ann. § 15-11-7(b); N.D. Cent. Code § 27-20-27(2); Wash. Rev. Code § 13.40.140(8).

[4] As is discussed in the briefs of Petitioner, some of his *amici*, and Respondent, a minority of state courts have, as a matter of applying *Miranda*, considered age as a factor in determining custodial status, though others have rejected that approach. Such judicial attempts to answer the federal constitutional question presented in this case do not constitute *state* policies regarding whether to classify custody based on age.

§ 41-5-331(1)(b); N.Y. Fam. Ct. Act § 305.2; S.D. Codified Laws § 26-7A-15. This requirement does not place any limit on what interrogation may occur and serves purposes wholly unrelated to interrogation. Parental notification *after* a child is taken into custody says nothing about when a child is in custody for *Miranda* purposes.

Other statutes contain protections specifically directed toward custodial interrogations. Some states require *Miranda* warnings to be provided in language understandable to a child. *See, e.g.*, Ala. Code § 12-15-202(a); Ark. Code Ann. § 9-27-317(i)(2). Others require that the child also be advised, in addition to his *Miranda* rights, that he has the right to communicate with his parents or guardian before speaking to police or have them present during questioning. *See, e.g.*, Ala. Code § 12-15-202(b); Mo. Ann. Stat. § 211.059(1)(3). Still others provide the child with a right to contact his parents, *see, e.g.*, Miss. Code Ann. § 43-21-303(3); or prohibit the police from questioning the child if he expresses a desire to speak to his parents, *see, e.g.*, Ark. Code Ann. § 9-27-317(i)(2)(C). Some states prohibit the use of any statements made during custodial interrogation of a juvenile under a certain age unless his parent, guardian, or attorney was present during the questioning. *See, e.g.*, Colo. Rev. Stat. § 19-2-511; N.C. Gen. Stat. § 7B-2101(b); Okla. Stat. tit. 10A, § 2-2-301(A); *see also* Me. Rev. Stat tit. 15, § 3203-A(2-A). Others do not allow juveniles to waive their *Miranda* rights on their own but require waiver by a parent, guardian, or attorney as well, at least if the child is under a certain age. *See, e.g.*, Ind. Code § 31-

32-5-1; Kan. Stat. Ann. § 38-2333(a); Mont. Code Ann. § 41-5-331(2); Tex. Fam. Code Ann. § 51.09. Indeed, out of all the statutes cited by Petitioner and his *amici*, only three involve limits on juvenile interrogations that apply even to non-custodial settings. *See* Conn. Gen. Stat. § 46b-137; N.M. Stat. Ann. § 32A-2-14; W. Va. Code § 49-5-2(l).

Thus, although state legislatures have enacted a variety of different measures to protect juveniles, the common theme is that they apply only to custodial settings. It is custody, and not age, that is the triggering factor for applying these additional protections because it is custody, and not simply age, that creates the need for the protections. By enacting these protections, states have taken into account the vulnerabilities of juveniles discussed by Petitioner's *amici* that may render them less equipped to handle the coercive environment of custody and have given juveniles additional tools to combat the pressures of custodial interrogation. Outside of that coercive environment, however, states generally have not required law enforcement to take age into account when talking to suspects or witnesses.[5] *See, e.g.*, *A.A. v. State*, 706 N.E.2d 259,

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[5] The way that officers must assess age to comply with these statutory protections during custody is qualitatively different than what would be required in a subjective analysis to determine custody. Moreover, the additional societal costs resulting from a subjective expansion of *Miranda* custody will be multiplied by the additional costs created by the accompanying expansion of the statutory requirements. Petitioner's proposed rule might discourage states from affording greater custodial rights

261 (Ind. Ct. App. 1999) ("[W]hen a juvenile who is not in custody gives a statement to police, neither the safeguards of *Miranda* warnings nor the juvenile waiver statute [requiring a co-waiver by a parent or attorney] is implicated.").

* * *

Expanding the scope of *Miranda* custody, and therefore *Miranda* warnings, carries with it costs to society in lost confessions and hindered investigations—costs that are worth bearing in situations that are truly custodial and coercive, but are not justifiable when expanded to situations that are not objectively so. *See Moran v. Burbine*, 475 U.S. 412, 426-27 (1986) (noting society's "legitimate and substantial interest in securing admissions of guilt" and stating that admissions of guilt are more than "merely desirable" because they are "essential to society's compelling interest" in investigating and punishing those who violate the law). Custodial status is properly predicated on objective, easily discernable factors. The subjective factors of age and maturity (and the like) already may be considered in the voluntariness inquiry, which is sufficient to address the concerns raised with regard to juvenile status. Thus, blurring the custody inquiry by adding subjective considerations depreciates the clarity of *Miranda* and imposes additional costs to society without creating any significant benefits.

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to juveniles, lest ordinary police work become too cumbersome.

Conclusion

The judgment of the Supreme Court of North Carolina should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

7

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IN THE SUPREME COURT OF THE UNITED STATES

J.D.B.,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent,

ON WRIT OF *CERTIORARI* TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF OF JUVENILE LAW CENTER, *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI

Amici Juvenile Law Center et al. work on issues of child welfare, juvenile justice, and children's rights. Amici have a particular expertise on the interplay between the constitutional rights of children and social science and neuroscientific research on adolescent development, especially with regard to children involved in the juvenile and criminal justice systems.[1]

This Court has yet to address directly how to assess the effect of age in determining whether a child is in custody for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966). *Amici* share a deep concern that the North Carolina Supreme Court's decision that *Miranda* custody decisions must be made without regard to age would subject scores of youth to interrogations they neither wish to participate in nor fully understand the consequences of, but cannot, because of their age, terminate or leave. Because youth are more likely than adults to make false confessions, *Amici* fear that such a rule would also undermine the truth-seeking function that proper interrogations fulfill.

For that reason, *Amici* join together to urge the Court to clarify that the *Miranda* custody determination must take age into account.

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[1] The consent of counsel for all parties is on file with the Court. No counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief. A brief description of all *Amici* appears at Appendix A.

SUMMARY OF ARGUMENT

In *Miranda v. Arizona*, this Court recognized that "rights declared in words might be lost in reality." 384 U.S. 436, 443 (1966). Thus the Court not only stated a broad principle regarding Fifth Amendment rights, it also outlined the specific procedures needed to protect an individual from making a compelled confession. *Id.* Without considering the age of the suspect in a custody determination, adolescents will be effectively excluded from the protections and guarantees of the Fifth Amendment.

It is now well settled that youth status bears on legal status. The "kids are different" doctrine for the purposes of constitutional jurisprudence is a principle firmly established in the decisions of the Court. In recent years, the doctrine has been buttressed by a burgeoning body of social science and neurological research demonstrating that the differences between youth and adults are psychological and physiological, as well as social. *See, e.g., Graham v. Florida*, 130 S.Ct. 2011 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005). The Court has thus repeatedly recognized that to make constitutional rights a reality for youth, an adolescent's age must be taken into account.

The facts of the instant case involve the interrogation by law enforcement of a thirteen year old middle school student in a closed conference room undertaken by both law enforcement and school administrators. The relevance of age to the *Miranda* custody determination is a question of first

impression for the Court. However, the question does not arise in a vacuum. Ample precedent in this and related areas support a holding by this Court that age is an objective factor that must be considered in determining whether a reasonable person would have felt free to terminate an interrogation.

For example, this Court has already acknowledged that youth are more susceptible to coercion and outside pressure, and specifically more susceptible to coercion during police interrogations. *See, e.g., Haley v. Ohio*, 332 U.S. 596, 599 (1948); *Gallegos v. Colorado*, 370 U.S. 49 (1962). Moreover, this Court has previously recognized the special vulnerability of youth to social and other pressures in the school setting, both because attendance at school is compulsory and because of youth's inherent deference to authority. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 592-93 (1992).

This Court has also highlighted the importance of providing "clear guidance to the police" regarding interrogations. *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004). The consideration of age serves this goal. Age is an objective, categorical and knowable characteristic, rather than a personal idiosyncrasy that an officer could not be expected to know at the time of interrogation. Indeed, as evidenced by state statutes, case law and police manuals, officers throughout the country routinely take age of the suspect into account at the point of interrogation.

As *Amici* demonstrate below, a child does not perceive of or respond to an interrogation in the same way as an adult. By refusing to make the consideration of age a part of the *Miranda* custody

determination, the North Carolina Supreme Court prevents adolescents from receiving the protections of the Fifth Amendment. It is precisely this disconnect between abstract rights and reality that the *Miranda* Court cautioned against.

Amici respectfully request that this Court reverse the North Carolina Supreme Court and hold that age must be considered in *Miranda* custody determinations.

ARGUMENT

This Court has long held that youth are different from adults in constitutionally relevant ways. The *Miranda* custody determination is no different. Because youth are more susceptible to coercion than adults, the question of whether they are in custody depends on their developmental status. Moreover, youth who are interrogated in the school environment are particularly vulnerable — both because their movement is curtailed by law and policy, and because the school setting exacerbates their susceptibility to coercion. For these reasons, age is a vital factor in the *Miranda* custody determination.

I. Age is a Crucial Factor in the *Miranda* Custody Determination

To determine whether J.D.B. was in custody, this Court has made clear that the test is (1) what

circumstances surround the interrogation and (2) "given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). Because this test turns on the suspect's view of his or her circumstances, the determination logically must take the suspect's age into account.

Indeed, age and the developmental differences between youth and adults have consistently informed this Court's treatment of adolescents under the Constitution. In the confession context, the Court has specifically recognized that the differences between adolescents and adults make them more susceptible to coercion and therefore entitled to Constitutional protections tailored to their particular needs. Age is no less relevant to the *Miranda* custody determination.

A. This Court Has Considered Juvenile Status In Construing Adolescents' Rights In Related Contexts

The issue before this Court – how age factors into *Miranda* custody determinations – is one of first impression. In *Yarborough v. Alvarado*, 541 U.S. 652 (2004), the Court reversed the Ninth Circuit ruling which held that juvenile status was relevant to the custody question.[2] However, the issue was raised

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[2] *Alvarado v. Hickman*, 316 F.3d 841,850 (9d Cir. 2002) (holding that the Yarborough was "in custody" when he was

through a federal *habeas* petition, which requires exceptional deference to a state court on habeus review. *Id.* at 665. *Yarborough* held only that the state court's refusal to consider Alvarado's age was a "reasonable" application of "clearly established law," and that case law had thus far failed to consider the relevance of "age" in *Miranda* cases. *Id.* at 666.[3] The instant case is now before the Court on direct appeal, allowing the Court to address the issue on the merits.[4]

In determining whether J.D.B. was in custody, the Court must consider all the circumstances that would bear on a reasonable person's belief that they were not free to terminate the interrogation and leave. In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court recognized the critical importance of ensuring that police do not give in to "the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions." *Id.* at 443 (citing *Brown v. Walker*, 161 U.S. 591, 596-97 (1896)). Individuals must be protected from "overzealous police practices." *Id.* at 444. This

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interrogated by police and therefore *Miranda* warnings were required.)

[3] The *Yarborough* Court addressed age and experience. The question of experience is not at issue here. Moreover, unlike age, the experience of a suspect is difficult, if not impossible for an officer to know.

[4] *Amici* clarify here that the appropriate standard for considering a *Miranda* issue on direct review is *de novo*. *See Lewis v. Texas*, 386 U.S. 707, 708 (1967). There is no reason to apply the Antiterrorism and Effective Death Penalty Act (AEDPA) "unreasonable application of clearly established federal law" standard here.

Court's rules about custodial interrogation must ultimately satisfy these goals.

The *Yarborough* Court acknowledged that "fair-minded jurists could disagree over whether Alvarado was in custody." *Yarborough v. Alvarado*, 541 U.S. 652, 653 (2004). As the majority observed, Alvarado was "five months shy of his 18th birthday" at the time of the alleged offense. *Id.* at 656. Justice O'Connor's concurrence in *Yarborough* acknowledged, however, that the adolescent's age could impact the determination of whether the child was in custody. *Id.* at 669 (O'Connor, J., concurring) (acknowledging that "there may be cases in which a suspect's age will be relevant to the Miranda 'custody' inquiry . . .") For example, a younger adolescent could have more difficulty understanding his rights and terminating police questioning than Alvarado. Police would also have an easier time predicting the child's reaction. *Id.*[5]

J.D.B. was only thirteen at the time of his interrogation, which occurred at school. Police unquestionably knew when they interrogated J.D.B. in his middle school that they were questioning a minor, and that his age would have a bearing on his responses to their questioning and his understanding of his situation. It can hardly be disputed that a reasonable thirteen-year-old will behave differently than a reasonable adult. To apply the adult standard to a thirteen-year-old defendant would allow police to create highly coercive situations without providing the legal protections designed to

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[5] Because age is but one factor in the custody "totality of the circumstances" test, it allows for the officer or the court to place more weight on it for a younger adolescent than an older one.

protect against false or coerced confessions. Age is an objective factor that should be considered in undertaking this analysis.

Moreover, while this Court has not directly considered age in the context of *Miranda* custody determinations, it has long held that the suspect's age is highly relevant in determining the voluntariness of an adolescent's confession and recognized that minors are more susceptible than adults to coercion during a police interrogation. As the Court observed specifically in *Haley v. Ohio*, 332 U.S. 596, 599 (1948), a teenager, too young to exercise or even comprehend his rights, becomes an "easy victim of the law."

In *Haley*, this Court held that a fifteen-year-old boy's confession should have been excluded because it was obtained by methods violative of the Due Process clause. Haley was interrogated from midnight until five in the morning by police officers working in relays. *Id.* at 598. He was neither informed of his rights nor provided access to counsel, friends, or family. *Id.* This Court's analysis of the voluntariness of Haley's confession turned on his juvenile status:

> Age 15 is a tender and difficult age for a boy of any race. . . . That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might

> stand the ordeal . . . But we cannot believe that a lad of tender years is a match for the police in such a contest.

Id. at 599-600. The juvenile suspect, in the Court's view, required a categorically different consideration because of his age.

Similarly, in *Gallegos v. Colorado*, 370 U.S. 49 (1962), this Court found unconstitutional the admission of the confession of a fourteen year old held for five days without access to his parents, lawyers or a judge. The Court's holding, which rested on due process grounds, took issue with "the element of compulsion . . . condemned by the Fifth Amendment." *Id.* at 51. Recognizing the relevance of age, the Court reasoned that the juvenile "cannot be compared with an adult in full possession of his sense and knowledgeable of the consequences of his admissions." *Id.* at 54. Without advice as to his rights or the benefit of more mature judgment, the Court found that the juvenile "would have no way of knowing what the consequences of his confession were" or "the steps he should take in the predicament in which he found himself." *Id.* Not only are youth more susceptible to coercion than adults, their limited understanding of the criminal justice system itself puts them at a disadvantage. Gallegos was "not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded" and therefore was "unable to know how to protect his own interests or how to get the benefits of his constitutional rights." *Id.* Thus, to interrogate a fourteen-year-old boy during a five-day detention would be "to treat him as if he had no constitutional rights." *Id.* at 55.

While voluntariness and custody are distinct questions, the confession cases are nevertheless instructive. The same characteristics of adolescence that would cause a youth to feel "overwhelm[ed]" during an interrogation would similarly cause a reasonable youth to feel that he could not leave the site of the interrogation. *Haley v. Ohio*, 332 U.S. 596, 599-600 (1948).

More recently, in decisions interpreting juveniles' rights under the Eighth Amendment, this Court has emphasized that adolescents' lack of maturity affects their decision-making capacity such that youth must be treated differently from adults for sentencing purposes. *See Graham v. Florida*, 130 S. Ct. 2011 (2010) (holding that juvenile offenders are considered categorically less culpable than adults and thus cannot be sentenced to life in prison without parole for nonhomicide crimes). *See also Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the death penalty cannot be applied to offenders who were under the age of eighteen when their crimes were committed due to their diminished culpability). These decisions rest not only on differing notions of culpability, but also on the recognition of juveniles' inadequate understanding of the criminal justice system and how to navigate it. *See Graham*, 130 S. Ct. at 2032 (2010) (noting that juveniles' limited understanding puts them at a "significant disadvantage in criminal proceedings"). *See also In re Gault*, 387 U.S. 1, 45 (1967) (finding that confessions of juveniles require "special caution").

Although *Graham* and *Roper* focus on juvenile culpability, the salient characteristics this Court identified as distinguishing juveniles from adults,

including immature decision-making and vulnerability to outside pressures, also operate to make juveniles more vulnerable to law enforcement interrogation and questioning. The *Miranda* inquiry should therefore recognize that teenagers, who are uniquely susceptible to coercion by police, experience custody differently than adults.

B. Social Science Research Confirms the Distinct Susceptibility of Youth to Coercion

Impairments in adolescents' decisionmaking and judgment are confirmed by social science research. Psychosocial factors influence adolescents' perceptions, judgment and decision-making and limit their capacity for autonomous choice. Elizabeth Cauffman & Laurence Steinberg, *Researching Adolescents' Judgment and Culpability*, *in Youth on Trial: A Developmental Perspective on Juvenile Justice* 325 (Thomas Grisso & Robert G. Schwartz eds., 2000); Kathryn Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences in Delinquency*, 32 L. & Hum. Behav. 78, 79-80 (2008). Specifically, adolescents' present-oriented thinking, egocentrism, greater conformity to authority figures, minimal experience and greater vulnerability to stress and fear leave juveniles more susceptible than adults to feeling that their freedom is limited.[6] Thus, a reasonable youth will feel that

[6] *See* Marty Beyer, *Recognizing the Child in the Delinquent*, 7 Ky. Child Rts. J. 16, 17 (Summer 1999); Marty Beyer,

he or she is in custody even when a reasonable adult will not.

Research further establishes that adolescents' lack of experience with stressful situations contributes to their more limited capacity to respond adeptly to such situations. *See* Laurence Steinberg & Robert G. Schwartz, Developmental Psychology Goes to Court, in Youth on Trial: A Developmental Perspective on Juvenile Justice 9, 26 (Thomas Grisso and Robert Schwartz eds. 2000). Adolescents tend to process information in an "either-or" way, particularly in stressful situations. Where adults perceive multiple options in a particular situation, adolescents may only perceive one. *See* Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 Crim. Just. 27, 27 (Summer 2000); Marty Beyer, *Recognizing the Child in the Delinquent*, 7 Ky. Child Rts. J. 16, 17-18 (Summer 1999). Juveniles' tendency to focus on the present moment, combined with their intense self-consciousness, makes it difficult for them to think past the time of interrogation to a point in which they would be free, preventing them from recognizing the possibility of terminating an interrogation.

Further, research confirms that "[a]dolescents are more likely than young adults to make choices that reflect a propensity to comply with authority

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Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases, 15 Crim. Just. 27, 27 (Summer 2000); David Elkind, *Egocentrism in Adolescence*, 38 Child Dev. 1025, 1029-30 (1967); Kids are Different: How Knowledge of Adolescent Development Theory Can Aid in Decision-Making in Court (L. Rosado ed. 2000); Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 Child Dev. 28, 30, 35-36 (2009).

figures . . . when being interrogated by the police." Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents and Adults' Capacities as Trial Defendants*, 27 L. & Hum. Behav. 333, 357 (2003); *see also* Lawrence Kohlberg, *The Psychology of Moral Development: The Nature and Validity of Moral Stages* 172-73 (1984). Thus, when subjected to police questioning, juveniles are less prone to feel as though they can end questioning or leave the room.

Younger children are even more susceptible to pressure during police interrogations than older adolescents. "A significant body of developmental research indicates that, on average, youths under the age of fourteen differ significantly from adolescents sixteen to eighteen years of age in their level of psychological development." Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice*, 83 N.C. L. Rev. 793, 817 (2005). Furthermore, children fifteen and younger are "significantly more likely than older adolescents and young adults to be impaired" in legal contexts. Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents and Adults' Capacities as Trial Defendants*, 27 L. & Hum. Behav. 333, 356 (2003).[7]

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[7] Indeed, a developmentally appropriate response to confessions from younger teenagers might go further because some such youth may not understand *Miranda* warnings, requiring the presence of counsel could even more reliably ensure the voluntariness – and accuracy – of their confessions. A study of youth's comprehension of *Miranda* warnings revealed that "understanding . . . was significantly poorer among juveniles who were 14 years of age or younger than among 15-16-year-old juveniles or adult offenders . . . ." Grisso, *Juveniles' Competence*

Younger suspects, who perceive themselves to be in custody, must at a minimum have their rights explained to them at the outset of questioning. A 13-year-old boy such as J.D.B. would not have believed that he could refuse to answer Officer DiCostanzo's questions and leave the school conference room. He was therefore in custody under *Miranda*.

II. Age is Particularly Crucial to the *Miranda* Custody Determination When Students are Interrogated in the School Setting

A. Adolescents' "Freedom of Action" Is Sharply Curtailed by School Law and Policies

An individual is in custody for *Miranda* purposes if his or her freedom is "curtailed in any significant way." *Miranda*, 384 U.S. at 467. Thus, to assess whether an individual is in custody, courts must determine how "a reasonable person in the position of the individual being questioned would gauge the breadth of his or her 'freedom of action.'" *Stansbury v. California*, 511 U.S. 318, 325 (1994).

In *Miranda*, this Court clarified that a suspect must be protected from compelled confessions in settings in which he is "deprived of every psychological advantage." *Miranda*, 384 U.S. at 449. The factual scenarios at issue in *Miranda* involved

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to Stand Trial, supra, at 356 (citing Thomas Grisso, *Juveniles' Waiver of Rights: Legal and Psychological Competence* 192 (1981)).

adults who were "thrust into" an "unfamiliar" and "police-dominated atmosphere," *id.* at 456-57, where they were "cut off from the outside world." *Id.* at 445. In contrast to those at home with the support of family or friends, such suspects were in environments where the "atmosphere suggests the invincibility of the forces of the law." *Id.* at 450. The *Miranda* Court, of course, was considering the vulnerability of *adults*; it did not even contemplate the factors that would limit an adolescent's freedom of action.

The relevant question here is not the impact the environment would have on an adult, but whether a reasonable thirteen-year-old interrogated under the circumstances here would have felt he was at liberty to terminate the interrogation and leave. Those circumstances included being pulled from class in the middle of the school day, escorted by a uniformed officer to a confined conference room, and subjected to questioning by four adults, including two police officers and two school officials. This requires an understanding of how a thirteen-year-old student in a school setting would perceive his or her breadth of "freedom of action." *Stansbury*, 511 U.S. at 325. *Amici* submit that the average adolescent would perceive his or her "freedom" quite narrowly.

Every state has compulsory school attendance laws. *See Ingraham v. Wright*, 430 U.S. 651, 660 n.14 (1977) (noting that compulsory school attendance laws have been in force in all states since 1918); Susanna Kim, *Section 1983 Liability in the Public Schools after Deshaney: the "Special Relationship" Between School and Student*, 41 UCLA L. Rev. 1101, 1126 (1994). The penalties for failure to attend

school can be severe: a youth can be detained,[8] declared a ward of the court,[9] or have criminal liability and even jail time imposed on his or her parents.[10] Once at school, minors must obey teachers and administrators or risk discipline, including suspension and expulsion. Indeed, the student handbook in J.D.B.'s school instructs students to stop moving when an adult addresses them and prohibits students from walking away until an adult has dismissed them. *In re J.D.B.*, 686 S.E.2d 135, 144 (N.C. 2009). The assessment of whether JDB thought he was in custody under the factual scenario here must take into account what it means to be a child in the school context.

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[8] *See, e.g.*, La. Child Code Ann. art. 733.1(West, Westlaw through 2010 Regular Session); Okla. Stat. Ann. tit. 70 § 10-109 (West, Westlaw through 2010 Chap. 479); *V-130549 v. Superior Ct. of Arizona*, 871 P.2d 758 (Ariz. Ct. App. 1994).

[9] *See, e.g.*, Cal. Welf. & Inst. Code § 601(b) (West, Westlaw through 2009 Reg. Sess. laws; 2009-2010 1st through 5th, 7th, and 8th Ex. Sess. laws; urgency legislation through Ch. 711 of the 2010 Reg. Sess.; and all Props. on 2010 ballots)) ("[I]f a minor has four or more truancies within one school year as defined in Section 48260 of the Education Code . . . the minor is then within the jurisdiction of the juvenile court which may adjudge the minor to be a ward of the court."); *In re Jamel F.*, 24 Misc. 3d 772 (N.Y. Fam. 2009) (nonattendance basis for allegations of educational neglect by parents).

[10] *See, e.g.*, Ariz. Rev. Stat. Ann. § 15-802 (West, Westlaw through Second Reg. Sess. and Ninth Sp.l Sess. of the 49th Legis. (2010)); N.C. Gen. Stat. §§ 115C-378, 115C-380 (West, Westlaw through 2010 Reg. Sess.); Tenn. Code Ann. § 49-6-3001 –3009 (West, Westlaw through 2010 First Ex. Sess. and Reg. Sess.). *See also* Dean Hill Rivkin, *Truancy Prosecutions and the Right [to] Education*, Duke F. for L. & Soc. Change (forthcoming), *available at* http://ssrn.com/abstract=1675968.

The North Carolina Supreme Court reasoned that J.D.B. was not in custody because the restrictions of the school environment apply to all students. *Id.* at 138 (N.C. 2009). Such reasoning makes no sense, as it would make it virtually impossible for a court to find that a student in a school setting was ever in custody. The constitutional test does not ask whether an individual would have felt more at liberty to leave than his or her peers. It asks simply whether a person in that situation would feel free to leave. J.D.B. could not have felt free to leave while simultaneously complying with the school rules to which he was subject.

The North Carolina Supreme Court's rule would also leave students in a uniquely vulnerable situation in which law enforcement would conduct interrogations at school specifically to avoid complying with the Miranda rule:[11]

> Questioning the student at school, the officer not only takes advantage of the student's compulsory presence at school and the background norm of submission to authority, but also chooses to interact with the student at a time when the student will not be in the presence of a parent, the figure most likely to have the inclination or ability to either arrange for the presence of counsel or to advise

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[11] This is in sharp contrast to the school acting "as guardian and tutor of children entrusted to its care," and therefore authorized, for example, to conduct special needs searches to maintain school safety. *Vernonia v. Acton*, 155 U.S. 646, 665 (1995).

the youth to refuse to answer the officer's questions.

Paul Holland, *Schooling* Miranda: *Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 Loy. L. Rev. 39, 85 n.175 (2006). That officers came to J.D.B.'s school to question him about an offense that took place during non-school hours and off school property underscores the problems with coercion of students and the importance of protecting youth in schools from such practices. In such situations, officers can use the school setting to circumvent the protection from coercion that a child would otherwise receive from his or her family.[12]

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[12] That many states require a parent's presence for such questioning underscores the importance of preserving the child/parent relationship and the protection from coercion that a minor can receive from his or her family. *See, e.g.*, Colo. Rev. Stat. Ann. § 19-2-511 (West, Westlaw through Second Reg. Sess. of the 67th Gen. Assembly (2010)); Conn. Gen. Stat. § 46b-137(a) (West, Westlaw through 2010 July Sp. Sess.); Ind. Code § 31-32-5-1 (West, Westlaw through 2010 Second Regular Sess.); Iowa Code Ann. § 232.11 (West, Westlaw through Acts from the 2010 Reg. Sess.); Kan. Stat. Ann. § 38-2333 (West, Westlaw through 2010 Reg. Sess.); Me. Rev. Stat. Ann. tit. 15 § 3203-A(2-A) (West, Westlaw through the 2009 Second Reg. Sess. of the 124th Legislature); Miss. Code Ann. § 43-21-303(3) (West, Westlaw through the 2010 Reg. and 1st Extraordinary Sess.); Mont. Code Ann. § 41-5-331 (West, Westlaw through all 2009 legislation); N.C. Gen. Stat. § 7B-2101 (West, Westlaw through 2010 Reg. Sess.); Okla. Stat. Ann. tit. 10A § 2-2-301 (West, Westlaw through 2010 Chap. 479); Tex. Fam. Code Ann. § 51.09 (West, Westlaw through 2009 Reg. and First Called Sess. of 81st Legis.); W.Va. Code § 49-5-2(l) (West, Westlaw current with Laws of the 2010 Second Extraordinary Sess.). *See also In the Matter of B.M.B.*, 955 P.2d 1302, 1312-13 (Kan. 1998);

Middle school is a "restrictive environment" in which "students are not free to leave the campus without permission," *In re J.D.B.*, 686 S.E.2d 135, 143 (N.C. 2009) (Brady, J., dissenting), and are unlikely to request their parents' assistance – even in a highly stressful situation. The majority below established a rule that would further allow police to exploit the school setting. Given that children are more susceptible to coercion than adults, this rule puts them in a particularly vulnerable position. While such tactics would be inappropriate regardless of the context, they are particularly troubling where, as here, the student posed no risk of disruption or threat to school safety.[13]

B. Students in School Settings Are Particularly Susceptible to Coercion.

This Court's jurisprudence recognizes not only that youth generally are more susceptible to coercion than adults, but also that youth *in school settings* are particularly susceptible to coercion. Under the First Amendment, for example, this Court has held that students require unique protections. In *Lee v. Weisman*, this Court held that primary and secondary school children should not be put in the position of having to choose between participating in a school prayer or protesting, even though such a choice may be acceptable for mature adults,

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M.A.C. v. Harrison County Family Court, 566 So.2d 472, 475 (Miss. 1990).

[13] In fact, removing J.D.B. from class caused more disruption to the school than questioning him in a less restrictive, more neutral environment, such as his home.

explaining that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." 505 U.S. 577, 592-93 (1992). *See also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) (finding that where a prayer was delivered before school football games, the school created a coercive situation in which students were unconstitutionally forced to choose between ignoring the pressure to attend the game or facing a personally offensive religious ritual). *See also Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987) (finding a Louisiana law proscribing the teaching of creationism along with evolution in public schools unconstitutional, because "[s]tudents in such institutions are impressionable and their attendance is involuntary"); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 115 (2001) (finding religious afterschool club at elementary school did not violate constitution in part because the club, unlike school, was not mandatory, met after school hours, and required parental permission).

Social science research has also shown the vulnerabilities of youth in school settings. Conflicts with authority are more likely to elicit feelings of powerlessness in younger children; this perception diminishes with increasing age. Lila Ghent Braine et al., *Conflicts with Authority: Children's Feelings, Actions, and Justifications*, 27 Developmental Psychol. 829, 839 (1991). Youth may comply with demands by teachers or police officers based on a blanket acceptance of authority instead of reasoning

about the individual request.[14] In school settings particularly, students may place greater weight on the authority of the adults they encounter. Indeed, "children judge that holding a social position . . . is one attribute that legitimizes a teacher's directives within the social context of the school".[15] Thus a child like J.D.B. would be likely to place greater weight on the authority of police officers in the company of school authority figures. The school environment increased the coercive effect of the police interrogation and left J.D.B. more vulnerable and fearful, and thus less able to terminate the interrogation.

III. A Suspect's Age Provides the Police with an Objective Standard by which to Determine Whether an Individual is in Custody.

In *Yarborough*, the Court highlighted the importance of providing "clear guidance to the police." *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004). Requiring the consideration of age furthers, rather than frustrates, this concern. First, age is an objective, categorical classification rather than a personal idiosyncrasy. Second, in the majority of states, police officers are already required by statute

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[14] *Id.* at 835 (in studying children's views of and compliance with authority, researchers have found that social context enhances a child's perception of authority and that children tend to give a blanket acceptance to authority figures).

[15] *See* Marta Laupa & Elliot Turiel, *Children's Concepts of Authority and Social Contexts*, 84 J. of Educational Psychol. 191, 191 (1993).

or case law to take age into consideration during interrogations. Finally, many police manuals themselves require the consideration of age during interrogations.[16]

A. Age is a Categorical Consideration Contemplated by the *Miranda* Custody Determination

This Court has clarified that the circumstances of the interrogation alone do not determine whether a suspect is in custody for *Miranda* purposes. *See, e.g.*, *Oregon v. Mathiason*, 429 US 492, 495 (1977) (holding that an adult's presence in a police station was not in itself determinative evidence of coercion requiring *Miranda* warnings); *Berkemer v. McCarty*, 468 U.S. 420, 436-439 (1984) (holding that a traffic stop was not custodial because it was brief, in person, and the person stopped would be reasonably sure that he would leave in the car).

In fact, the Court has been clear that the rule must adequately protect those with particular vulnerabilities. In *Miranda* itself, this Court recognized the critical importance of ensuring that

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[16] Moreover, while there may be cases in which police officers are mistaken about a suspect's age, a "reasonable police officer" standard would easily address this. If a suspect lies about his or her age, for example, and an officer fails to issue *Miranda* warnings, that evidence would be admissible. Furthermore, the consequences of this rule are not severe — they don't prevent officers from interrogating youth. They simply require police to treat the child as if he or she is in custody.

police do not give in to "the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions." 384 U.S. 436 at 443 (citing *Brown v. Walker*, 161 U.S. 591, 596-97 (1896)). By referring to the "timid or reluctant" suspect, the Court noted the importance of creating a rule that would protect vulnerable suspects.

To be sure, the custody rule cannot require officers to guess at the "frailties or idiosyncracies of every person whom they question." *Berkemer*, 468 U.S. at 442 n.35 (internal citations omitted). Thus a suspect's criminal past and police record are not relevant to the custody determination as they are "unknowable to the police." *Id.* at U.S. at 430-32. Such matters would require police to know about or guess at the individual's unique personal history.

In contrast, a subject's age is not an individual frailty or idiosyncrasy. It is an easily identifiable, categorical and objective factor for the police to consider. As Justice Breyer observed in his dissent in *Yarborough*, age "is not a special quality, but rather a widely shared characteristic that generates commonsense conclusions about behavior and perception" — age can be easily appraised. *Yarborough*, 541 U.S. at 674 (Breyer, J., dissenting). Failure to account for such categorical distinctions could lead to highly problematic results. A reasonable blind suspect cannot be expected to read a typed document advising him that he is free to leave. A reasonable deaf suspect cannot be expected to have heard an oral warning. Similarly, a reasonable child cannot be expected to understand his options in the same way that an adult would.

This approach is well in keeping with the use of the "reasonable person" standard in other contexts. As Justice Breyer further noted:

> the precise legal definition of "reasonable person" may, depending on legal context, appropriately account for certain personal characteristics. In negligence suits, for example, the question is what would a "reasonable person" do "'under the same or similar circumstances.'" In answering that question, courts enjoy "latitude" and may make "allowance not only for external facts, but sometimes for certain characteristics of the actor himself," including physical disability, youth, or advanced age.

Id. at 674 (Breyer J., dissenting) (citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 32, 174-79 (5th ed. 1984)). Similarly, the Restatement (Second) of Torts clarifies that "*Unless the actor is a child*, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances." Restatement (Second) of Torts, § 283 (1965) (emphasis added).

An adolescent's age is a categorical and objective factor appropriate for consideration in the *Miranda* custody determination.

B. Many States Already Require Consideration of the Suspect's Age During Police Interrogations

The majority of states recognize, either by statute or case law, that youth need special protections during interrogations. In many states, the rules specifically require the consideration of age during custodial interrogations. At least eighteen state statutes[17] and twelve appellate decisions[18]

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[17] *See e.g.*, Ala. Code 1975 § 12-15-202 (West, Westlaw through 2010 Reg. Sess.); Ark. Code Ann. § 9-27-317(d)(2) (West, Westlaw through changes made by Ark. Code Rev. Comm. through September 2010); Colo. Rev. Stat. Ann. § 19-2-511 (West, Westlaw through Second Reg. Sess. of 2010); Conn. Gen. Stat. § 46b-137(a) (West, Westlaw through 2010 July Sp. Sess.); Ga. Code Ann., § 15-11-7 (West, Westlaw through 2010 Reg. Sess.); Ind. Code § 31-32-5-1 (West, Westlaw through 2010 Second Reg. Sess.); Iowa Code Ann. § 232.11 (West, Westlaw through Acts from the 2010 Reg. Sess.); Kan. Stat. Ann. § 38-2333 (West, Westlaw through 2010 Reg. Sess.); Me. Rev. Stat. Ann. tit. 15 § 3203-A(2-A) (West, Westlaw through the 2009 Second Reg. Sess.); Miss. Code Ann. § 43-21-303(3) (West, Westlaw through the 2010 Reg. and 1st Extraordinary Sess.); Mont. Code Ann. § 41-5-331(2) (West, Westlaw through all 2009 legislation); Mo. Ann. Stat. § 211.059 (1) & (2) (West, Westlaw through the end of the 2010 First Extraordinary Sess., pending corrections received from the MO Revisor of Stat.); N.C. Gen. Stat. § 7B-2101 (West, Westlaw through 2010 Reg. Sess.); N.D. Cent. Code Ann., 27-20-27(2) (West, Westlaw through the 2009 Reg. Sess.); N.M. Stat. Ann. 1978 § 32A-2-14 (D) & (E) (West, Westlaw through the Second Reg. Sess. and the Second Sp. Sess. of 2010); N.Y. Fam. Ct. Act Law § 305.2 (7) & (8) (McKinney, Westlaw through L. 2010, chap. 1 to 59 & 61 to 481); Okla. Stat. Ann. tit. 10A, § 2-2-301 (West, Westlaw through 2010 Chap. 479); Tex. Fam. Code Ann. § 51.09 (West, Westlaw through 2009 Reg. and First Called Sess. of 81st Legis.); W.Va.

require special practices for the interrogation of adolescents. In many of these states, age is an explicit component of the custody determination.

In a number of states, courts have established that the test is "whether, based upon the objective circumstances, a reasonable child of the same age would believe her freedom of movement was significantly restricted." *In re L.M.*, 993 S.W.2d 276, 288-89 (Tex. App. 1999). *See also People v. Ward*, 95 A.D.2d 351, 353-54 (N.Y. App. Div. 1983) ("the reasonable perceptions of a child must be judged by a standard which takes into account the emotional and intellectual immaturity of a juvenile" and "the age of the juvenile must be considered a major factor."); *Ramirez v. State*, 739 So.2d 568, 574 (Fla. 1999) ("not only a reasonable juvenile, but even a reasonable adult in Ramirez's position, would have believed that he was in custody . . .").[19]

Code § 49-5-2(l) (West, Westlaw current with Laws of the 2010 Second Extraordinary Sess.).

[18] *In re Jorge D.*, 43 P.3d 605 (Ariz. Ct. App. 2002); *People v. T.C.*, 898 P.2d 20 (Colo. 1995) (en banc); *Ramirez v. State*, 739 So.2d 568, 574 (Fla. 1999); *State v. Doe*, 948 P.2d 166, 173 (Idaho Ct. App. 1997); *In re Joshua David C.*, 698 A.2d 1155, 1162 (Md. Ct. Spec. App. 1997); *Commonwealth v. A Juvenile*, 521 N.E.2d 1368, 1370 (Mass. 1988); *In re D.R.M.S.*, No. A05-2471, 2006 WL 3361948 (Minn. Ct. App. Nov. 21, 2006); *People v. Garcia*, 103 A.D.2d 753 (N.Y. App. Div. 1984); *In re Loredo*, 865 P.2d 1312, 1315 (Or. Ct. App. 1993); *In re L.M.*, 993 S.W.2d 276, 288-89 (Tex. App. 1999); *In re K.W.*, No. 9-08-57, 2009 WL 1845240, at *6 (Ohio Ct. App. June 29, 2009); *State v. D.R.*, 930 P.2d 350 (Wash. App. 1997).

[19] *See also In re Loredo*, 865 P.2d at 1315. Although the Court ultimately determined that the child was not in custody because the officer explicitly informed him that he was free to leave, was not under arrest, and did not have to speak – and made an

An even greater number of state courts have held that age must be taken into account as one of the circumstances in the "totality of the circumstances" test. For example, the Idaho Court of Appeals explained:

> [T]he objective test for determining whether an adult was in custody for purposes of *Miranda*, giving attention to such factors as the time and place of the interrogation, police conduct, and the content and style of the questioning, applies also to juvenile interrogations, but with additional elements that bear upon a child's perceptions and vulnerability, including the child's age, maturity and experience with law enforcement and the presence of a parent or other supportive adult.

State v. Doe, 948 P.2d 166, 173 (Idaho Ct. App. 1997). Courts around the country have applied a similar analysis.[20]

Still other jurisdictions proscribe the interrogation of a child by law enforcement in the

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effort to be "unimposing." The Court did establish that the custody determination depended on "whether a reasonable person in child's position – that is, a child of similar age, knowledge and experience, placed in a similar environment – would have felt required to stay and answer." *Id.*

[20] *See, e.g., In re Jorge D.*, 43 P.3d 605, 608-09 (Ariz. Ct. App. 2002); *People v. Howard*, 92 P.3d 445, 450 (Colo. 2004); *In re Joshua David C.*, 698 A.2d 1155, 1162 (Md. Ct. Spec. App. 1997); *In re D.R.M.S.*, No. A05-2471, 2006 WL 3361948 (Minn. Ct. App. Nov. 21, 2006); *In re Loredo*, 865 P.2d 1312, 1315 (Or. Ct. App. 1993); *In re L.M.*, 993 S.W.2d 276, 288-89 (Tex. App. 1999); *State v. D.R.*, 930 P.2d 350 (Wash. App. 1997); *CSC v. State*, 118 P.3d 970, 977, 978 (Wyo. 2005).

absence of a parent,[21] or require the parents to be informed of the child's questioning or arrest.[22] Many of these states also require that the parent receive information about the child's *Miranda* rights.[23] These parental involvement and notification statutes necessarily assume that an officer can and will

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[21] Colo. Rev. Stat. Ann. § 19-2-511(West, Westlaw through Second Reg. Sess. of 2010); Conn. Gen. Stat. § 46b-137 (West, Westlaw through 2010 July Sp. Sess.); Kan. Stat. Ann. § 38-2333(a) (West, Westlaw through 2010 Reg. Sess.) (pertaining to interrogations of juveniles under the age of 14); Me. Rev. Stat. Ann. tit. 15 § 3203-A(2-A) (West, Westlaw through the 2009 Second Reg. Sess.) (establishing that no law enforcement officer may question a juvenile until the legal custodian is notified and is present or gives consent to questioning to continue. If officers cannot locate the custodian after reasonable efforts, they may continue questioning a juvenile about "continuing or imminent criminal activity"); N.Y. Fam. Ct. Act Law § 305.2(7) (McKinney, Westlaw through L.2010, chap. 1 to 59 and 61 to 481); Okla. Stat. Ann. tit. 10A, § 2-2-301(A) (pertaining to confessions of juveniles under the age of 16) (West, Westlaw through 2010 Chap. 479). Other states require that parents be present for a valid waiver of rights. Iowa Code Ann. § 232.11(2) (West, Westlaw through Acts from the 2010 Reg. Sess.).

[22] *See, e.g.*, 18 U.S.C.A. § 5033 (West, Westlaw through P.L. 111-264 approved 10-8-10); Cal. Welf. & Inst. Code § 627(West, Westlaw through 2009 Reg. Sess. laws, 2009-2010 1st through 5th, 7th, and 8th Ex. Sess. laws; urgency legislation through Ch. 711 of the 2010 Reg. Sess.; and all Props. on 2010 ballots); Mo. Ann. Stat. §211.059(1)(3) (West, Westlaw through the end of the 2010 First Extraordinary Sess. of the 95th Gen. Assembly, pending corrections received from the MO Revisor of Stat.); N.C. Gen. Stat. Ann. § 7B-2101(a) (West, Westlaw through 2010 Reg. Sess.).

[23] *See* Conn. Gen. Stat. § 46b-137(b) (West, Westlaw through 2010 July Sp. Sess.); Okla. Stat. Ann. tit. 10A, § 2-2-301 (pertaining to the interrogation of youth under sixteen years of age) (West, Westlaw through 2010 Chap. 479); W. Va. Code Ann. § 49-5-2(d) (West, Westlaw current with Laws of the 2010 Second Extraordinary Sess.).

determine whether the suspect is a minor and therefore deserving of these additional protections. Likewise, in other states which require that an officer administer *Miranda* warnings in "language understandable to a child,"[24] it is presumed, at the very least, that officers must be aware of the age of the youth and modify their interrogation procedures accordingly. Moreover, officers must routinely consider a child's age at the time of interrogation to enforce certain laws, such as truancy laws or curfew laws, or to direct the child's case for juvenile or adult prosecution.[25]

Police manuals further reinforce these practices. These manuals, like the rule proposed here, require police to assess a child's age before interrogating him or her. The Florida Highway Patrol Manual, for example, requires officers to contact a juvenile's family and allow family members to be present and involved during interrogations, limits the number of police officers permitted to interrogate a juvenile, limits the length of an interrogation, and requires regular breaks for the juvenile.[26] None of these rules

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[24] *See, e.g.*, Ala. Code 1975§ 12-15-202(a) (West, Westlaw through 2010 Reg. Sess.); Ark. Code Ann. § 9-27-317 (West, Westlaw through changes made by Ark. Code Rev. Comm. through September 2010).

[25] *See, e.g.*, Fla. Stat. Ann § 985.125(4) (West, Westlaw through Chap. 274 of 2010 Second Reg. Sess. and Chap. 282 of 2010 Special "A" Session) (outlining officers' authority to make pre-arrest diversion determinations); D.C. Juv. Ct. R. 102-3 (designating diversion authority to police officers at the point of initial contact with minors, this discretion is unique to minor offenders).

[26] Florida Highway Patrol, *Florida Highway Patrol Policy Manual*, 11.03 (2008), *available at* http://www.flhsmv.gov/fhp/Manuals/. For another example, see

could be met without consideration, and indeed inquiry into the child's age at the outset. The manual of the Cincinnati Police Department requires that "when dealing with juvenile offenders, it is the policy of the Police Department to employ the least coercive of the enforcement directives available to properly address the situation." Cincinnati Police Department, *Cincinnati Police Department Procedure Manual*, Section 12.900 (2010), *available at* http://www.cincinnati-oh.gov/police/pages/-5960-/.[27]

Significantly, the Chapel Hill police manual applicable in this case was no exception. The manual provides that "[e]ven if the juvenile is not in custody, it is good practice to have him sign a Miranda Rights waiver form before issuing a statement. If the juvenile does not sign a waiver, the officer must document that the juvenile is told that he is not under arrest and free to leave at any time, and that he agreed to talk." Chapel Hill Police Dep't, Policy Manual No. 2-12 (*Juvenile Response*), at 4 (Dec. 15, 2006 (revised)). A rule requiring police to assess a

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the Minneapolis Police Department, *Policy and Procedures Manual* 8-107 (2008), *available at* http://www.ci.minneapolis.mn.us/mpdpolicy (directing officers to advise all juveniles of their *Miranda* rights, to consider their age and their capacity to understand those rights, and to allow a parent or guardian to be present, if their presence is not deemed coercive or intimidating).

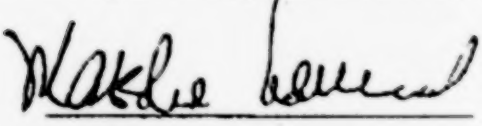
[27] The manual also directs officers questioning youth to limit the number of officers present, provide additional explanations of the juvenile justice system to the juvenile's parent/guardian, notify a juvenile's parents, and limit the length of questioning as appropriate to the physical and emotional condition to the juvenile. *Id.* at section 12.900.D.9a(3).

suspect's age at the time of interrogation not only provides clear guidance to police, it also reflects prevailing practice in the jurisdictions nationwide.

CONCLUSION

Age is an objective factor that police can and routinely do consider in determining whether a suspect is in custody for *Miranda* purposes. Youth are categorically different from adults. Holding them to the adult standard for the purpose of the *Miranda* custody determination is contrary to sound research and to this Court's long-standing acknowledgement that youth must be taken into account when interpreting provisions and mandates of the Constitution. For the foregoing reasons, *Amici Curiae* respectfully request that this Court reverse the decision of the North Carolina Supreme Court and hold that the *Miranda* custody inquiry must take into account the age of an adolescent suspect.

Respectfully submitted,



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Appendix A

Identity of Amici and Statements of Interest

Individuals

Tamar Birckhead is an assistant professor of law at the University of North Carolina at Chapel Hill where she teaches the Juvenile Justice Clinic and the criminal lawyering process. Her research interests focus on issues related to juvenile justice policy and reform, criminal law and procedure, and indigent criminal defense. Licensed to practice in North Carolina, New York and Massachusetts, Professor Birckhead has been a frequent lecturer at continuing legal education programs across the United States as well as a faculty member at the Trial Advocacy Workshop at Harvard Law School. She is vice president of the board for the North Carolina Center on Actual Innocence and has been appointed to the executive council of the Juvenile Justice and Children's Rights Section of the North Carolina Bar Association. Professor Birckhead received her B.A. degree in English literature with honors from Yale University and her J.D. with honors from Harvard Law School, where she served as Recent Developments Editor of the Harvard Women's Law Journal. She regularly consults on matters within the scope of her scholarly expertise, including issues related to juvenile justice policy and reform, criminal law and procedure, indigent criminal defense, and clinical legal education. She is frequently asked to assist litigants, advocates, and scholars with amicus briefs, policy papers, and expert

testimony, as well as specific questions relating to juvenile court and delinquency.

Jeffrey Fagan is a Professor of Law and Public Health at Columbia University, and Director of the Center for Crime, Community and Law at Columbia Law School. He currently is Fellow at the Straus Institute for the Advanced Study of Law and Justice, at New York University School of Law. He was a member of the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice. Professor Fagan is currently conducting research on several dimensions of juvenile law and juvenile justice, including the competence and culpability of adolescents facing transfer to the criminal court, and the impacts of transfer and adult punishment on adolescent development. He also is conducting research on the impacts of involuntary police contacts with juveniles on their perceptions of law and justice. He has also conducted research on the death penalty for persons who commit capital offenses before their 18th birthday, and for sentences of life without the possibility of parole for persons who commit crime before their 18th birthday; this research suggests that the developmental limitations of adolescents may compromise their capacity for full participation in legal proceedings when the harshest forms of punishment are at stake, whether in criminal or juvenile court. Professor Fagan has conducted research on capital punishment, and his research has shown that false confessions are often a cause of wrongful conviction and reversible error. Accordingly, he agrees to sign this amicus brief to assist in defining standards and procedures for

assessing the age-based competence of adolescents during interactions with police and law enforcement authorities when they may be asked to participate in interrogations without their full knowledge or consent.

Barbara Fedders is a clinical assistant professor at the University of North Carolina School of Law. Prior to joining the UNC faculty in January 2008, Professor Fedders was a clinical instructor at the Harvard Law School Criminal Justice Institute for four years. Prior to that, she worked for the Massachusetts Committee for Public Counsel Services as a Soros Justice Fellow and staff attorney. She began her career in clinical work at the Juvenile Rights Advocacy Project at Boston College Law School. As a law student, Professor Fedders was a Root-Tilden-Snow scholar and co-founded the NYU Prisoners' Rights and Education Project. She is a member of the advisory boards of the Prison Policy Initiative and the Equity Project.

Barry Feld is Centennial Professor of Law, University of Minnesota Law School. He received his B.A. from the University of Pennsylvania; his J.D. from University of Minnesota Law School; and his Ph.D. in sociology from Harvard University. He has written eight books and about seventy law review and criminology articles and book chapters on juvenile justice with a special emphasis on serious young offenders, procedural justice in juvenile court, adolescents' competence to exercise and waive Miranda rights and counsel, youth sentencing policy, and race. One of his earliest books, Neutralizing Inmate Violence: Juvenile Offenders in Institutions

(Ballinger 1976), studied ten different juvenile correctional programs and the impact of institutional security practices on social control. His most recent books include: Bad Kids: Race and the Transformation of the Juvenile Court (Oxford 1999), which received the Outstanding Book Award from the Academy of Criminal Justice Sciences and the Michael Hindelang Outstanding Book Award from the American Society of Criminology; Cases and Materials on Juvenile Justice Administration (West 2000; 2nd Ed. 2005); and Juvenile Justice Administration in a Nutshell (West 2002). Feld has testified before state legislatures and the U. S. Senate, spoken on various aspects of juvenile justice administration to legal, judicial, and academic audiences in the United States and internationally. He worked as a prosecutor in the Hennepin County (Minneapolis) Attorney's Office and served on the Minnesota Juvenile Justice Task Force (1992 -1994), whose recommendations the 1994 legislature enacted in its revisions of the Minnesota juvenile code. Between 1994 and 1997, Feld served as Co-Reporter of the Minnesota Supreme Court's Juvenile Court Rules of Procedure Advisory Committee.

Theresa Glennon is the Feinberg Professor of Law at the James E. Beasley School of Law at Temple University. She conducts research and writing and teaches in the areas of education law, family law and disability. Her scholarship includes a focus on issues concerning children. She served as a staff attorney at the Education Law Center-Pennsylvania from 1985-1989, prior to entering legal academia, where she focused on the legal rights of students with disabilities. She is currently a

member of the Board of Trustees of the Education Law Center of Pennsylvania, a volunteer mediator for custody disputes in the Philadelphia Family Court, and a member of the Institutional Review Board for Public/Private Ventures, which reviews research proposals for educational, afterschool and other social services programs involving teenagers and others in order to ensure the protection of human subjects.

Martin Guggenheim is the Fiorello La Guardia Professor of Clinical Law at N.Y.U. Law School, where he has taught since 1973. He served as Director of Clinical and Advocacy Programs from 1988 to 2002 and also was the Executive Director of Washington Square Legal Services, Inc. from 1987 to 2000. He has been an active litigator in the area of children and the law and has argued leading cases on juvenile delinquency and termination of parental rights in the Supreme Court of the United States. He is also a well-known scholar whose books include "What's Wrong with Children's Rights" published by Harvard University Press in 2005 and "Trial Manual for Defense Attorneys in Juvenile Court," published by ALI-ABA in 2007 which was co-authored with Randy Hertz and Anthony G. Amsterdam. He has won numerous national awards including in 2006 the Livingston Hall Award given by the American Bar Association for his contributions to juvenile justice.

Professor Kristin Henning joined the faculty of the Georgetown Law Center in 1995 as a Stuart-Stiller Fellow in the Criminal and Juvenile Justice Clinics. As a Fellow she represented adults and children in the D.C. Superior Court, while

supervising law students in the Juvenile Justice Clinic. In 1997, Professor Henning joined the staff of the Public Defender Service (PDS) for the District of Columbia where she continued to represent clients and helped to organize a Juvenile Unit designed to meet the multi-disciplinary needs of children in the juvenile justice system. Professor Henning served as Lead Attorney for the Juvenile Unit from 1998 until she left the Public Defender Service to return to Georgetown in 2001. As lead attorney, she represented juveniles in serious cases, supervised and trained new PDS attorneys, and coordinated and conducted training for court-appointed attorneys representing juveniles.

Professor Henning has been active in local, regional and national juvenile justice reform, serving on the Board of the Mid-Atlantic Juvenile Defender Center, the D.C. Department of Youth Rehabilitation Services Advisory Board and Oversight Committee, and on local D.C. Superior Court committees such as the Delinquency Working Group and the Family Court Training Committee. She has published a number of law review articles on the role of child's counsel, the role of parents in delinquency cases, confidentiality in juvenile courts, and therapeutic jurisprudence in the juvenile justice system. She is also a lead contributor to the *Juvenile Law and Practice* chapter of the District of Columbia Bar Practice Manual and has participated as an investigator in eight state assessments of the access to counsel and quality of representation for juveniles.

Kris Henning received her undergraduate degree from Duke University, a J.D. from Yale Law

School in 1995, and an LL.M. degree from Georgetown University Law Center in 2002. In 2005, Kris was selected as a Fellow in the Emerging Leaders Program of the Duke University Terry Sanford Institute of Public Policy and the Graduate School of Business at the University of Cape Town, South Africa. Professor Henning also traveled to Liberia in 2006 and 2007 to aid the country in juvenile justice reform and was awarded the 2008 Shanara Gilbert Award by the Clinical Section of the Association of American Law Schools in May for her commitment to social justice, service to the cause of clinical legal education, and an interest in international clinical legal education.

Barry A. Krisberg is currently a Senior Fellow and Lecturer in Residence at the University of California, Berkeley School of Law and was recently a Visiting Scholar at John Jay College in New York City.

He is known nationally for his research and expertise on juvenile justice issues and is called upon as a resource for professionals, foundations, and the media.

Dr. Krisberg received his master's degree in criminology and a doctorate in sociology, both from the University of Pennsylvania.

Dr. Krisberg has held several educational posts. He was a faculty member in the School of Criminology at the University of California at Berkeley. He was also an adjunct professor with the Hubert Humphrey Institute of Public Affairs at the

University of Minnesota and the Department of Psychiatry at the University of Hawaii.

Dr. Krisberg was appointed by the legislature to serve on the California Blue Ribbon Commission on Inmate Population Management. He is past president and fellow of the Western Society of Criminology and is the Chair of the California Attorney General's Research Advisory Committee. In 1993 he was the recipient of the August Vollmer Award, the American Society of Criminology's most prestigious award. The Jessie Ball duPont Fund named him the 1999 Grantee of the Year for his outstanding commitment and expertise in the area of juvenile justice and delinquency prevention. Dr. Krisberg was appointed to chair an Expert Panel to investigate the conditions in the California youth prisons. He has recently been named in a consent decree to help develop remedial plans and to monitor many of the mandated reforms in the California Division of Juvenile Justice. He has also assisted the Special Litigation Branch of the USDOJ on CRIPA investigations. He has been retained by the New York State Office of Children and Family Services to assist in juvenile justice reforms.

Edward D. Ohlbaum is Professor of Law and Director of Trial Advocacy and Clinical Legal Education at Temple Law School. He was awarded the prestigious Richard S. Jacobson Award, given annually by the Roscoe Pound Foundation to one professor for "demonstrated excellence in teaching trial advocacy" in 1997. The architect of Temple's unique L.L.M. in Trial Advocacy, his programs have won awards from the American College of Trial

Lawyers and the Committee on Professionalism of the American Bar Association. The author of three books, Professor Ohlbaum is a frequent speaker on evidence and advocacy at key international and domestic conferences. He serves on the Board of the Support Center for Child Advocacy is actively involved in representing children in termination of parental rights cases. He is a former senior trial lawyer with the Defender Association of Philadelphia.

Professor **Jane M. Spinak** is the Edward Ross Aranow Clinical Professor of Law at Columbia Law School. In 1982, she co-founded the Child Advocacy Clinic at Columbia which currently represents adolescents aging out of foster care. During the mid-1990s, Professor Spinak served as attorney-in-charge of the Juvenile Rights Division of The Legal Aid Society of New York City, one of the nations' leading organizations in the field of child advocacy. In 2005, Professor Spinak was named a Human Rights Hero for her work on behalf of children by the ABA's Human Rights Magazine. In 2008 she was awarded the Howard A. Levine Award for Excellence in Juvenile Justice and Child Welfare by the New York State Bar Association. Professor Spinak is currently co-chairing the Task Force on Family Court in New York City established by the New York County Lawyer's Association.

The Child Advocacy Clinic has provided representation to children and youth in the child welfare system for almost thirty years. The Adolescent Representation Project (ARP) focuses on the distinct needs of youth aging out of foster care,

taking into consideration the special aspects of youth that distinguishes them from adults, including their development and limited range of experiences. The issues facing these youth extend across a broad spectrum of need, including housing and homelessness prevention, teen parenting, health and health benefits, income and support benefits, education, tuition and financial aid benefits, financial planning, civil rights, including LGBTQ issues, job training and career planning, and domestic violence. One project of the ARP is an interdisciplinary investigation into how representation of adolescents is different than representation of younger children or adults.

Organizations

Advocates for Children's Services (ACS) is a statewide project of Legal Aid of North Carolina, a federally funded 501(c)3 organization. ACS represents poor and low income children who are deprived of their federal and state rights to necessary services, particularly their fundamental state constitutional right to a sound basic education and their federal right to special education.

Many ACS clients face unjustified long term school suspensions and then referrals to delinquency or adult criminal court. Police, known as School Resource Officers, are armed and present in most middle schools and high schools. The issue of interrogations in the school setting and what rules should regulate that process is of significant interest to ACS.

The **Barton Child Law & Policy Clinic** is a program of Emory Law School dedicated to ensuring safety, well-being and permanency for abused and court-involved children in Georgia. These outcomes are best achieved when systems only intervene in families when absolutely necessary, treat children and families fairly, provide the services and protections they are charged to provide, and are accountable to the public and the children they serve. The mission of the clinic is to promote and protect the well-being of neglected, abused and court-involved children in the state of Georgia, to inspire excellence among the adults responsible for protecting and nurturing these children, and to prepare child advocacy professionals.

The Barton Clinic was founded in March 2000. The Barton Clinic has been involved in representation of juveniles in delinquency cases since the summer of 2001. Initially, such representation occurred in collaboration with the Southern Juvenile Defender Center, which was housed in the Barton Clinic until 2005. The Barton Clinic currently houses the Barton Juvenile Defender Clinic (JDC), which was founded in 2006.

The JDC provides a clinical experience for third year law students in the juvenile court arena. The focus of the clinical experience is to provide quality representation to children by ensuring fairness and due process in their court proceedings and by ensuring courts make decisions informed by the child's educational, mental health and family systems objectives. As part of their clinical experience, student attorneys represent child clients

in juvenile court and provide legal advocacy in the areas of school discipline, special education, mental health and public benefits, when such advocacy is derivative of a client's juvenile court case. Students also engage in research and participate in the development of public policy related to juvenile justice issues.

Legal services provided by the Barton Clinic are provided at no cost to our clients.

The **Center on Children and Families** (CCF) at Fredric G. Levin College of Law is based at University of Florida, the state's flagship university. CCF's mission is to promote the highest quality teaching, research and advocacy for children and their families. CCF's directors and associate directors are experts in children's law, constitutional law, criminal law, family law, and juvenile justice, as well as related areas such as psychology and psychiatry. CCF supports interdisciplinary research in areas of importance to children, youth and families, and promotes child-centered, evidence-based policies and practices in dependency and juvenile justice systems. Its faculty has many decades of experience in advocacy for children and youth in a variety of settings, including the Virgil Hawkins Civil Clinic and Gator TeamChild juvenile law clinic.

The **Central Juvenile Defender Center**, a training, technical assistance and resource development project, is housed at the Children's Law Center, Inc. In this context, it provides assistance on indigent juvenile defense issues in Ohio, Kentucky,

Tennessee, Indiana, Arkansas, Missouri, and Kansas.

Citizens United for Rehabilitation of Errants (CURE) is a national grassroots criminal justice reform organization. We work to reduce the number of people who are incarcerated and to ensure that those who are incarcerated are provided with the resources they need to turn their lives around. Ensuring due process and adequate representation is critical if we are to ensure that people are not incarcerated unnecessarily. We are convinced that juveniles need special protections because of their limited understanding of the criminal justice system and because their developmental status often leads to poor judgment.

The ***Civitas* ChildLaw Center** is a program of the Loyola University Chicago School of Law, whose mission is to prepare law students and lawyers to be ethical and effective advocates for children and promote justice for children through interdisciplinary teaching, scholarship and service. Through its Child and Family Law Clinic, the ChildLaw Center also routinely provides representation to child clients in juvenile delinquency, domestic relations, child protection, and other types of cases involving children. The ChildLaw Center maintains a particular interest in the rules and procedures regulating the legal and governmental institutions responsible for addressing the needs and interests of court-involved youth.

The **Children's Law Center, Inc.** in Covington, Kentucky has been a legal service center

for children's rights since 1989, protecting the rights of youth through direct representation, research and policy development and training and education. The Center provides services in Kentucky and Ohio, and has been a leading force on issues such as access to and quality of representation for children, conditions of confinement, special education and zero tolerance issues within schools, and child protection issues. It has produced several major publications on children's rights, and utilizes these to train attorneys, judges and other professionals working with children.

Founded in 1977, the **Children's Law Center of Massachusetts (CLCM)** is a private, non-profit legal services agency that provides direct representation and appellate advocacy for indigent children in juvenile justice, child welfare and education matters. CLCM's mission is to promote and secure equal justice and to maximize opportunity for low-income children and youth Further, the CLCM is committed to assuring children's age and developmental factors are considered by decision makers when imposing policies or penalties that impact children's lives. This case presents questions of significance both to the children who are involved in the justice system and to the attorneys who represent them. The *amici* hope their views will add to the Court's consideration of the issues raised in this appeal.

The **Education Law Center - PA** is a public-interest organization dedicated to ensuring that all Pennsylvania children have access to a quality public education. Founded in 1975, ELC-PA focuses primarily on the needs of poor children, children

in the child welfare system, children with disabilities, English language learners, and others who are often at a disadvantage in the public education system. ELC has represented many children charged by the police with school-based misconduct. ELC seeks to participate as *amicus* in order to share our views concerning the application of *Miranda* to the school situation.

Formed in 1997, the **Justice Policy Institute (JPI)** is a policy development and research body which promotes effective and sensible approaches to America's justice system. JPI has consistently promoted a rational criminal justice agenda through policy formulation, research, media events, education and public speaking. Through vigorous public education efforts, JPI has been featured in the national media. The Institute includes a national panel of advisors to formulate and promote public policy in the area of juvenile and criminal justice. JPI conducts research, proffers model legislation, and takes an active role in promoting a rational criminal justice discourse in the electronic and print media.

Juvenile Law Center, founded in 1975, is the oldest multi-issue public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Recognizing the critical developmental differences between youth and adults, Juvenile Law Center works to ensure that the child welfare, juvenile justice, and other public systems provide vulnerable children with the protection and

services they need to become healthy and productive adults. Juvenile Law Center works to ensure that law enforcement practices comport with principles of adolescent development. Juvenile Law Center participates as *amicus curiae* in state and federal courts throughout the country, including the United States Supreme Court, in cases addressing the rights and interests of children.

Founded in 1975 as a nonprofit organization, **Legal Services for Children (LSC)** is one of the first non-profit law firms in the country dedicated to advancing the rights of youth. LSC's mission is to ensure that all children in the San Francisco Bay Area have an opportunity to be raised in a safe and stable environment with equal access to the services they need to become healthy and productive young adults. We provide holistic advocacy through teams of attorneys and social workers in the area of abuse and neglect, immigration and education. We empower clients by actively involving them in critical decisions about their lives. We believe that all legal decisions and actions involving children and youth must take research on child development and the unique needs of children into account.

Founded in 1977, the **National Association of Counsel for Children (NACC)** is a 501(c)(3) non-profit child advocacy and professional membership association dedicated to enhancing the well being of America's children. The NACC works to strengthen the delivery of legal services to children, enhance the quality of legal services affecting children, improve courts and agencies serving children, and advance the rights and

interests of children. NACC programs which serve these goals include training and technical assistance, the national children's law resource center, the attorney specialty certification program, the model children's law office program, policy advocacy, and the amicus curiae program. Through the amicus curiae program, the NACC has filed numerous briefs involving the legal interests of children in state and federal appellate courts and the Supreme Court of the United States. The NACC uses a highly selective process to determine participation as amicus curiae. Amicus cases must past staff and Board of Directors review using the following criteria: the request must promote and be consistent with the mission of the NACC; the case must have widespread impact in the field of children's law and not merely serve the interests of the particular litigants; the argument to be presented must be supported by existing law or good faith extension the law; there must generally be a reasonable prospect of prevailing. The NACC is a multidisciplinary organization with approximately 2000 members representing all 50 states and the District of Columbia. NACC membership is comprised primarily of attorneys and judges, although the fields of medicine, social work, mental health, education, and law enforcement are also represented.

The **National Black Law Students Association (NBLSA)** is a 501(c)(3) corporation and the nation's largest student-run organization representing nearly 6,000 minority law students from approximately 200 chapters and affiliates throughout the United States and six other countries. Founded in 1968, NBLSA was created and

designed to advocate for changes within the legal system that will make it more responsive to the needs and concerns of the Black community. The organization's 2010-2011 Child Advocacy and Empowerment initiative aims to raise awareness about the unique challenges for youth in the criminal justice system and combat the disproportionate contact that minority youth have with the juvenile justice system.

The **National Juvenile Defender Center** was created to ensure excellence in juvenile defense and promote justice for all children. The National Juvenile Defender Center responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. The National Juvenile Defender Center gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice.

The National Juvenile Defender Center provides support to public defenders, appointed counsel, child advocates, law school clinical programs and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural and tribal areas. The National Juvenile Defender Center also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

The **Northeast Juvenile Defender Center (NRJDC)** is dedicated to increasing access to justice for and the quality of representation afforded to children caught up in the juvenile and criminal justice systems. Housed jointly at Rutgers Law School - Newark and the Defender Association of Philadelphia, the NRJDC provides training, support, and technical assistance to juvenile defenders in Pennsylvania, New Jersey, New York, and Delaware. The NRJDC also works to promote effective and rational public policy in the areas of juvenile detention and incarceration reform, disproportionate confinement of minority children, juvenile competency and mental health, and the special needs of girls in the juvenile justice system.

The **Rutgers Urban Legal Clinic**, a clinical program of Rutgers Law School – Newark, was established over thirty years ago to assist low-income clients with legal problems that are caused or exacerbated by urban poverty. The Clinic's Criminal and Juvenile Justice section provides legal representation to individual clients and undertakes public policy research and community education projects in both the juvenile and criminal justice arenas. In recent years, ULC students and faculty have worked with the New Jersey Office of the Public Defender, the New Jersey Institute for Social Justice, the Essex County Juvenile Detention Center, Covenant House – New Jersey, staff of the New Jersey State Legislature, and a host of national organizations on a range of juvenile justice practice and policy issues, including questions pertaining to

the due process and fourth amendment rights of young people.

The **Sentencing Project** is a national non-profit organization engaged in research and advocacy on criminal justice and juvenile justice policy. Policy research conducted by The Sentencing Project is widely cited in academic and professional circles, and staff of the organization are regularly invited to testify before Congress, the U.S. Sentencing Commission, and state legislative bodies. The organization has published widely on issues of sentencing policy, racial disparity, juvenile justice policy, and the impact of incarceration on public safety, as well as submitting amicus briefs to the U.S. Supreme Court on sentencing policy and juvenile life without parole.

The **Youth Law Center** is a San Francisco-based national public interest law firm working to protect the rights of children at risk of or involved in the juvenile justice or child welfare systems. Since 1978, Youth Law Center attorneys have represented children in civil rights and juvenile court cases in California and two dozen other states. They have provided training, technical assistance, research and written materials to juvenile justice officials in almost every state. The Center's attorneys are often consulted on juvenile policy matters, and have participated as amicus curiae in cases around the country involving important juvenile system issues. The Center has long been involved in public policy discussions, legislation and court challenges involving the treatment of juveniles in the juvenile and criminal justice systems. It has worked to

ensure that the particular needs of children are recognized at the initial stages of law enforcement investigation. Center attorneys took part in the MacArthur Foundation study of adolescent development as it relates to criminal justice concepts, and authored Incompetent Youth in California Juvenile Justice, published in the Stanford Law & Policy Review.

AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

J.D.B.,

Petitioner,

—v.—

NORTH CAROLINA

Respondent.

On Writ of Certiorari to the Supreme Court of North Carolina

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

Since its founding more than 50 years ago, NACDL has worked to ensure justice and due process for persons accused of crime or wrongdoing, and to preserve and promote a fair and rational criminal justice system. *Amicus curiae* writes to advance these objectives in the context of legal determinations of when an individual is "in custody" under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and its progeny. The important issue raised in this case presents the opportunity for this Court to announce a rule that not only is consistent with its prior decisions, but which also provides meaningful guidance to law enforcement officials and promotes a fair and rational criminal justice system. The appropriate rule to serve all of these goals is one confirming that, where at the time of questioning the interrogating officer knows the age of the person being questioned, a court may consider that age in a *Miranda* custody analysis

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1 Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation of this brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* certifies that on November 29 and November 30, 2010, counsel of record for Respondent and Petitioner respectively consented to the filing of *amicus curiae* briefs, in support of either party or of neither party.

as it evaluates the totality of the circumstances and determines whether a reasonable person in the individual's position would have felt he or she was free to terminate the police questioning and leave.

SUMMARY OF THE ARGUMENT

The age of a person is an objective fact that, when known by the interrogating officer, is a circumstance of the interrogation that a court may properly consider in a *Miranda* custody analysis. In *Yarborough* v. *Alvarado*, 541 U.S. 652 (2004), this Court held that the state court did not "unreasonably apply . . . clearly established Federal law" by neglecting to consider Alvarado's age[2] explicitly in its *Miranda* custody analysis. In so holding, the Court expressly left open the question whether a court *may* consider age—and, if so, under what circumstances. Consistent with *Miranda* and its progeny, including *Alvarado*, *amicus curiae* NACDL respectfully urges this Court to confirm in this case that age, like other factual circumstances that comprise an interrogation environment, may be properly considered by a court as part of the "totality of circumstances" for purposes of the *Miranda* custody test when that fact is known by both parties to the interrogation.

Permitting a court to consider age, when known, as part of the *Miranda* custody test does not convert the analysis into a subjective test. In order to be relevant

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2 Notably, the question presented in *Alvarado* raised the issue of the suspect's "age and experience"—not age alone. Although "age and experience" are conflated in various parts of the Court's opinion in *Alvarado*, the reasoning of the majority, concurring, and dissenting opinions in that case each included reasoning directed specifically at age alone and not "age and experience."

to the "custody" analysis, a factor under consideration must be an "objective fact," not a "subjective experience" that "depend[s] on the actual mindset of a particular suspect." See *Alvarado*, 541 U.S. at 667-68. The age of the person being questioned, when known to the interrogating officer, is not a "subjective experience" or a matter subject to debate or interpretation. When an objective fact—including the age of the person being questioned—is known to the interrogating officers, they need not engage in guesswork about the person's particular "frailties or idiosyncrasies." See *Berkemer* v. *McCarty*, 468 U.S. 420, 442 n.35 (1984). Although interrogating officers (and courts) will have to assess the relative impact and significance of age in the context of all other objective circumstances, this is no different—and no less "objective"—than the analysis for any other circumstance this Court has upheld as appropriately considered under the *Miranda* custody test, such as the length or location of the interrogation. Also like any other objective fact, age will not be dispositive. It may not even be significant in some cases, as in *Alvarado*, depending upon the particular facts. That said, the objective exercise of applying a reasonable person standard necessitates an evaluation of "*all* of the circumstances surrounding the interrogation," *Stansbury* v. *California*, 511 U.S. 318, 322 (1994) (per curiam) (emphasis added), in order for the court to "determine what it would have been like for a reasonable man to be in the suspect's shoes," *Thompson* v. *Keohane*, 516 U.S. 99, 119 (1995) (Thomas, J., dissenting). To the extent that the age of the interviewee is known to the questioner and may materially affect whether a reasonable person in the position of the interviewee would view himself as free to leave, that objective fact should not be

excluded from the custody inquiry. Cf. *United States* v. *Arvizu*, 534 U.S. 266, 274-75 (2002) (criticizing lower court's removal of certain factors from its analysis under a "totality of the circumstances" test).

The *Alvarado* majority noted that "[t]here is an important conceptual difference between the *Miranda* custody test and the line of cases from other contexts considering age and experience"—such as, for example, the voluntariness of confessions. 541 U.S. at 667. But the fact that the inquiries are conceptually distinct does not mean that age is irrelevant in the "custody" context. For example, this Court has already recognized a number of factors, such as the location and length of the interrogation, as being relevant both to the voluntariness inquiry that assesses the suspect's state of mind as well as the custody analysis that is based upon a reasonable person standard. See, e.g., *Gallegos* v. *Colorado*, 370 U.S. 49, 52-53, 54, 55 (1962) (noting relevance of the length of questioning in voluntariness analysis); *In re Gault*, 387 U.S. 1, 53, 54 (1967) (in context of voluntariness analysis, noting instances where interviewee was "placed in the police station" and where statements were "made at police headquarters"); *Alvarado*, 541 U.S. at 664-65 (noting as relevant factors in custody test that questioning took place "at the police station" and that "[t]he interview lasted two hours, four times longer than the 30-minute interview in *Mathiason*"); *Mathiason* v. *Oregon*, 429 U.S. 492, 495-96 (1977) (location of interrogation is relevant to custody test, albeit not dispositive); *id.* at 495 (noting as relevant to custody test the fact that interview lasted half an hour).

Certain common factors are inherent in the interactions between law enforcement officers and

suspects, and these factors, when present and known to both parties, will inform any determination based upon the totality of the circumstances. The age of a suspect, like the location or length of the questioning, is one of the objective facts that (when known to the interrogating officer) should inform a court's decision whether the interrogation was custodial, in addition to informing a court's decision whether any statement made was voluntary. To the extent an individual's age affects a reasonable and objective view of whether that person would have felt he or she was not free to leave under the circumstances of the case, the age of the individual should not be ignored.

Considering age as part of the custody inquiry does not impose any impractical or inappropriate burdens on law enforcement and is consistent with *Miranda*'s policy goal to provide clear guidelines to law enforcement. Conversely, a holding that the suspect's age is *never* relevant to the custody analysis could put officers in the odd position of having to ignore certain facts about the suspect that would have bearing on the interrogation environment. In this case, the interrogating officer was specially trained in juvenile law enforcement and was well aware of the juvenile suspect's age. The officer chose the child's middle school as the site of an interrogation regarding a non-school incident and conducted the interrogation during school hours in a closed conference room, without contacting the child's guardian. In these circumstances, a rule permitting a court to consider the juvenile's age as part of the custody inquiry would not complicate the analysis of or place undue burdens upon the police. Such a rule simply allows a court to account for the knowledge of the interrogation scene that an officer and suspect both have, consistent with this Court's precedents.

ARGUMENT

I. THE AGE OF A PERSON BEING QUESTIONED BY THE POLICE MAY, CONSISTENT WITH *MIRANDA* AND *ALVARADO*, BE PART OF THE CUSTODY ANALYSIS

The age of a person is an objective fact that, when known to the interrogating officer, is a circumstance that properly may be considered in a *Miranda* custody analysis. A holding that a court *may* consider the age of the person in question is consistent with this Court's decisions in *Miranda* and its progeny, including *Yarborough* v. *Alvarado*, 541 U.S. 652 (2004).

It is well established that, in determining whether a reasonable person in the position of the interviewee would have felt that he or she was at liberty to terminate the questioning, a court should look to the totality of the circumstances in assessing the interrogation environment. See, *e.g.*, *Stansbury*, 511 U.S. at 322 ("In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation[.]"), quoted in *Alvarado*, 541 U.S. at 663 (discussing "clearly established law" with respect to the custody inquiry). *Alvarado* left open the question whether the age of the person being interrogated may be one of the objective circumstances considered. None of the three opinions in *Alvarado* suggested that age is *never* relevant to the custody test.[3]

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3 As noted by the Petitioner, *see* Pet. Br. at 24, four members of the Court in *Alvarado* opined that age "*could* be viewed as creating a subjective inquiry[.]" 541 U.S. at 668 (emphasis added); one Justice opined that "[t]here may be cases in which a

This Court in *Alvarado* held only that, under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the state court had not "unreasonably applied clearly established Federal law" when it failed to consider explicitly Alvarado's age in its finding that Alvarado was not "in custody" for *Miranda* purposes. By so holding, the Court rejected the court of appeals' determination that "clearly established Federal law" *required* a court to consider age in applying the *Miranda* custody test and that failure to do so was "unreasonable" in Alvarado's case.[4] See 541 U.S. at 666 ("Our opinions applying the *Miranda* custody test have not mentioned the suspect's age, much less *mandated* its consideration." (emphasis added)).

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suspect's age will be relevant to the *Miranda* 'custody inquiry,'" *id.* at 669 (O'Connor, J., concurring); and four Justices opined that "youth is an objective circumstance . . . it is not a special quality, but rather a widely shared characteristic that generates commonsense conclusions about behavior and perception[.]" *id.* at 674 (Breyer, J., dissenting).

4 The facts of 17-and-a-half-year-old Alvarado's case were in many ways quite different from the facts presented here in 13-year-old J.D.B.'s case. See Pet. Br. at 1-9. In addition to being far younger at the time of questioning than Alvarado, J.D.B. was, among other facts, removed from class for questioning at school during school hours, with no notification to his guardian prior to the interrogation. *Id.* Further, unlike Alvarado, whom the questioning officer "did not threaten or suggest he would be placed under arrest," *Alvarado*, 541 U.S. at 664, J.D.B. was told that "this thing is going to court" no matter what and was threatened with the prospect of a "secure custody order" — an order that, as noted in the decision below, the investigator explained to J.D.B. would give law enforcement the right to hold J.D.B. in juvenile detention even before a court proceeding. see *In the Matter of J.D.B.*, 686 S.E.2d 135, 144 & n.4 (N.C. 2009) (Brady, J., dissenting).

The Court's decision emphasized the deferential standard to which it was required to adhere and the narrowness of its holding. "We cannot grant relief under AEDPA by conducting our own independent inquiry into whether the state court was correct as a *de novo* matter." *Id.* at 665. Indeed, the Court noted, incorrect decisions can still be "reasonable" applications of "clearly established federal law." See *id.* ("'[A] federal habeas court may not issue the writ simply because that court concludes in its indepe ent judgment that the state-court decision applied [the law] incorrectly.'" (quoting *Woodford* v. *Visciotti*, 537 U.S. 19, 24-25) (2002) (per curiam))). This is not an AEDPA case, and the Court now has an opportunity to decide the "de novo" question that was at issue—but not decided by this Court—in *Alvarado*.

In its efforts to argue that age can *never* be a factor in a *Miranda* custody analysis, Respondent seizes on the *Alvarado* majority's statement that "the custody inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect's individual characteristics—including his age—could be viewed as creating a subjective inquiry." 541 U.S. at 668. But that is not part of the holding in *Alvarado*, nor does it represent a conclusion that an objective fact such as the age of a suspect always *would* (or, for that matter, ever *should*) be viewed as creating a subjective inquiry. See *id.* at 675 (Breyer, J., dissenting) ("[T]he majority makes no real argument at all explaining *why* any court would believe that the objective fact of a suspect's age could *never* be relevant."); *id.* at 669 (O'Connor, J., concurring) ("There may be cases in which a suspect's age will be relevant to the 'custody' inquiry under *Miranda*[.]").

By contrast, the majority opinion in *Alvarado* clearly did reject the court of appeals' consideration of "Alvarado's prior history with law enforcement" as part of the custody inquiry. According to the Court, consideration of the suspect's interrogation history "was improper not only under the deferential standard of 28 U.S.C. § 2254(d)(1), but also as a *de novo* matter." *Id.* at 668. The court noted that, "[i]n most cases, police officers will not know a suspect's interrogation history." *Id.* (citing *Berkemer*, 468 U.S. at 430-31). Thus, *Alvarado* clearly left open the question of whether the age of a suspect may be considered in the custody inquiry as one of the "objective circumstances that are known to both the officer and the suspect." See *id.* at 674 (Breyer, J., dissenting) ("In the present context . . . of *Miranda*'s 'in custody' inquiry, the law has introduced the concept of a 'reasonable person' to avoid judicial inquiry into subjective states of mind, and to focus the inquiry instead upon objective circumstances that are known to both the officer and the suspect and that are likely relevant to the way a person would understand his situation."). The age of the person interacting with the police is precisely the type of objective circumstance that should inform the custody decision.

Under the totality of the circumstances analysis, the age of a suspect may or may not be relevant, depending upon whether age is, from the attendant facts and circumstances, either something actually known by the officer or a fact that any reasonable officer would have known—as here when the officer conducts an interrogation at a middle school.[5] As this

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5 The officer in this case was a juvenile officer who also testified that he had actual knowledge of J.D.B.'s age because it

Court has held in an analogous context, "[a]n officer's knowledge or beliefs may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned." *Stansbury*, 511 U.S. at 325 (stating that an officer's belief that the person being interrogated is a suspect is "relevant only to the extent it would affect how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action" (internal quotation marks omitted)).

So, too, with the age of the person being interrogated. Like the interrogating officer's beliefs as to whether the person is a suspect, age (arguably a more "objective" fact than an officer's disclosed belief[6]) may be relevant to the totality of the circumstances if it is a fact that is communicated or known to both parties. Accord *Alvarado*, 541 U.S. at 665 ("Counsel for Alvarado alleges that Alvarado's parents asked to be present at the interview but were rebuffed, a fact that—*if known to Alvarado*—might reasonably have led someone in Alvarado's position to feel more restricted than otherwise." (emphasis added)); *Stansbury*, 511 U.S. at 324-25; *Beckwith* v. *United States*, 425 U.S. 341, 347 (1976) (finding irrelevant for purposes of the *Miranda* custody test that police knew prior to the start of the interview

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was provided in school records that the officer reviewed prior to the interrogation. See Pet. Br. at 2-3, 26-27.

6 *See Stansbury*, 511 U.S. at 324-25 ("It is well settled, then, that a police officer's *subjective* view that the individual under questioning is a suspect, *if undisclosed*, does not bear upon the question whether the individual is in custody for purposes of *Miranda*"—but "*may* bear upon the custody issue if . . . conveyed, by word or deed, to the individual being questioned." (emphases added)).

that the suspect was the "focus" of the investigation, where this fact was not disclosed to the suspect).

II. PERMITTING A COURT TO CONSIDER AGE, WHEN KNOWN, AS PART OF THE *MIRANDA* CUSTODY TEST DOES NOT CONVERT THE ANALYSIS INTO A SUBJECTIVE TEST

A rule that allows but does not require a juvenile's age to be considered when applying the *Miranda* custody test would not convert this objective test into a subjective one. In order to be relevant to the "custody" analysis, a factor under consideration must be an "objective fact," not a "subjective experience" that "depend[s] on the actual mindset of a particular suspect." See *Alvarado*, 541 U.S. at 667-68. "To be sure, the line between permissible objective facts and impermissible subjective experiences can be indistinct in some cases." *Id.* at 667. But the age of the person being questioned—when known to the interrogating officer—is not a "subjective experience" or a matter subject to debate or differences in interpretation. Age is instead an objective fact that provides relevant information about "the suspect's position" and how a reasonable person in the position of the person being questioned "would have understood his situation." See *Alvarado* at 674 (Breyer, J., dissenting).

When an objective fact—including the age of the person being questioned—is known to the interrogating officers, they need not "divine" any information or engage in guesswork about the person's particular "frailties or idiosyncrasies." See *Berkemer*, 468 U.S. at 442 n.35. Although interrogating officers (and courts) will have to assess the relative impact and significance of age in the

context of all other objective circumstances, this is no different—and no less "objective"—than the analysis for any other factor or circumstance this Court has considered under the *Miranda* custody test.

For example, the Court has held that the length of interrogation is an objective fact that is relevant to the custody determination. See, *e.g.*, *Alvarado*, 541 U.S. at 665; *Berkemer*, 468 U.S. at 436-39. But the length of the interrogation is not a standard that can be applied mechanically and without reference to the other relevant facts and circumstances. A relatively lengthy interrogation that occurs in a public place may be less likely to cause a person being questioned to perceive that he or she was not free to terminate the questioning and leave than relatively short questioning behind a closed and locked door. Compare *Orozco* v. *Texas*, 394 U.S. 324 (1969) (holding that brief interrogation behind closed doors, in suspect's home, was custodial), with *Berkemer*, 468 U.S. 420 (holding that "persons temporarily detained" pursuant to "ordinary traffic stops," which are typically brief and public, "are not 'in custody' for the purposes of Miranda," but that such stops may become custodial if prolonged), cited in *Pennsylvania* v. *Bruder*, 488 U.S. 9, 11 & n.2 (1988) (noting "*Berkemer*'s rule" that "ordinary traffic stops" are not custodial, but that a motorist "could be found to have been placed in custody for purposes of *Miranda*" in cases of a "traffic stop that involves prolonged detention").

There is no ready formula to determine when an interrogation becomes too long and therefore is determined to be sufficiently coercive to amount to what a reasonable person would view as a "custodial" interrogation. This determination always will

depend upon the totality of the particular facts of the case. Yet that has not prevented this Court from acknowledging the relevance, for purposes of the *Miranda* custody test, of how brief or prolonged an interrogation was. See, *e.g.*, *Alvarado*, 541 U.S. at 665 ("The interview lasted two hours, four times longer than the 30-minute interview in *Mathiason*."); *Bruder*, 488 U.S. at 11 & n.2; *Berkemer*, 468 U.S. at 437-39; *Mathiason*, 429 U.S. at 495.

The Court also has looked to the location of the interrogation as being relevant to the custody analysis. All else being equal, a "stationhouse" interview typically is viewed as more "coercive" than an interrogation that happens in public or in the suspect's home. See, *e.g.*, *Berkemer*, 468 U.S. at 438-39 (noting that "questioning incident to an ordinary traffic stop," typically brief and public, "is quite different from a stationhouse interrogation, which frequently is prolonged" and "police dominated") (citing *Miranda*, 384 U.S. at 451)); see also *Orozco*, 394 U.S. at 326 ("'[C]ompulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.'" (quoting *Miranda*, 384 U.S. at 461)).

Even so, this Court has held that a "stationhouse" interview can be "noncustodial," see, *e.g.*, *Mathiason*, 429 U.S. at 495, and that an interrogation conducted in a suspect's home or in public can be "custodial." See, *e.g.*, *Orozco*, 394 U.S. 324 (interrogation in suspect's home was custodial); *Bruder*, 488 U.S. 11 n.2 (traffic stops, though public, can be custodial if prolonged). The fact that the application of a particular factor or circumstance —such as the length

or location of the interview—does not automatically translate into a determination of whether a person is or is not in custody does not mean that that factor or circumstance is a subjective one. Nor does it mean that such a factor provides no meaningful guidance to the police or to the courts. See Part IV, *infra*.

The "ultimate determination" in the custody test requires a court to "consider *all* of the circumstances surrounding the interrogation," *Stansbury*, 511 U.S. at 322 (emphasis added), and then put itself "in the suspect's shoes" in order "to determine what it would have been like for a reasonable man to be in the suspect's shoes." *Thompson*, 516 U.S. at 119 (Thomas, J., dissenting); see also *Alvarado*, 541 U.S. at 662 ("[C]ustody must be determined based on how a reasonable person in the suspect's situation would perceive his circumstances."). Within this objective, reasonable person context, the Court has considered, among other factors, whether the interrogation was conducted in private or in public, whether individuals other than law enforcement officers and the suspect were present, and whether the questioning occurred behind a closed and/or locked door. Any of these factors, like age, may have a greater or lesser impact on a particular individual, but, as a general matter, they provide an objective and workable test for how a "reasonable person" would assess the situation from the position of the person being questioned. The fact that the interrogation occurs behind closed doors, for example, is a relevant and objective factor, *Berkemer*, 468 U.S. at 438 (emphasizing the relevance of questioning being "expos[ed] to public view"), because common sense indicates that a closed door would make many feel less "free to go" than a door that is open (or, indeed, a setting with no door at all). Likewise, the fact of the suspect's age, when known to

the officer, is a relevant and objective consideration. The younger the child, the more likely it is that a reasonable person in the suspect's position would not have felt free to get up and leave while being confronted by authority figures. See *Alvarado*, 541 U.S. at 676 (Breyer, J., dissenting) ("Common sense, and an understanding of the law's basic purpose in this area, are enough to make clear that Alvarado's age—an objective, widely shared characteristic about which the police plainly knew—is also relevant to the inquiry.").[7]

Like any other objective fact, age will not be dispositive and may not even be significant in some cases. With respect to any of these relevant factors—including length and location of interrogation—there is no formula that tells law enforcement officials what the weight of a particular factor will be in a court's ultimate custody analysis. The relative weight of any one factor is always dependent upon the other facts and circumstances of the particular case; that is, indeed, the essence of a "totality of the circumstances" test. See, *e.g.*, *Stansbury*, 511 U.S. at 325 ("The weight and pertinence of any communications regarding the officer's degree of suspicion will depend upon the facts and circumstances of [a] particular case.").

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7 See also Pet. Br. at 12-15, 19 (citing precedents of this Court recognizing and holding significant the fundamental differences between juveniles and adults); *id.* at 15-17 (noting examples of state legislatures' widespread recognition of the fundamental differences between juveniles and adults); *id.* at 19-21, 23 (discussing social science studies and evidence from the hard sciences, such as data from MRI examinations, demonstrating fundamental differences between juveniles and adults).

Here, a 13-year-old was questioned in a middle-school conference room with a closed door during school hours, after being pulled out of a seventh-grade classroom and without any consent from or even consultation with his parents or guardians. Under these circumstances, the age of the interviewee (a known fact) may reasonably contribute to the conclusion that he was not free to end the interview and leave. That is a different "totality of circumstances" than, for example, a 17-year-old being interrogated in the food court of a shopping mall. In either case, the age of the person being questioned may be relevant only if it is known to the questioner and only to the extent that it has bearing upon whether a reasonable person in the position of the person being questioned would have felt that he or she was free to terminate the questioning and leave.

Allowing consideration of age will not create a multiplicity of standards. To the contrary, the test would continue to be the same "reasonable person" test that this Court has repeatedly reaffirmed. All that changes is that the age of the individual being questioned may be one of the objective facts comprising the totality of the circumstances for that particular case. Just as the reasonable person standard allows a court to consider whether the interrogation was 20 minutes or one hour or six hours, the reasonable person standard likewise should allow a court to consider whether the person being questioned is 12 years old, 17 years old, or 35 years old.[8]

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8 See also Pet. Br. at 21 (noting other legal contexts in which age is a relevant objective factor that may properly be considered in the analysis). This is not to say that these other inquiries are not conceptually different from the *Miranda*

III. THE FACT THAT AN INDIVIDUAL'S AGE IS RELEVANT WHEN EVALUATING THE VOLUNTARINESS OF A STATEMENT SUPPORTS THE CONCLUSION THAT AGE ALSO SHOULD BE CONSIDERED AS AN OBJECTIVE FACT IN THE CUSTODY ANALYSIS

The majority opinion in *Alvarado* noted that "[t]here is an important conceptual difference between the *Miranda* custody test and the line of cases from other contexts considering age and experience." 541 U.S. at 667. More specifically,

> [T]he objective *Miranda* custody inquiry could reasonably be viewed as different from doctrinal tests that depend on the actual mindset of a particular suspect, where we do consider a suspect's age and experience. For example, the voluntariness of a statement is often said to depend on whether the defendant's will was overborne, a question that logically can depend on the characteristics of the accused.

Id. at 667-68 (citations and internal quotation marks omitted). But the fact that the inquiries are conceptually distinct does not mean that age is irrelevant in the "custody" context. The *Alvarado* Court noted that the voluntariness inquiry depends on whether the defendant's will is overborne, whereas the custody test depends on whether the

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custody test—to be sure, they are. Rather, it is only to point out that the consideration of circumstances that vary from case to case, and have varying degrees of weight and significance from case to case, does necessarily convert of an objective test to a subjective one.

interrogation environment is sufficiently coercive that a reasonable person in the suspect's position would feel that he or she was not at liberty to terminate police questioning and leave. See *id.* at 661 ("*Miranda* itself held that preinterrogation warnings are required in the context of custodial interrogations given 'the compulsion inherent in custodial surroundings.'" (quoting *Miranda*, 384 U.S. at 458)). In both cases—but in different ways—the level of coercion is critical to the core inquiry. Under the voluntariness doctrine, the level of coercion (as evidenced by a number of factors) is examined in order to discern the actual mindset of the suspect; under the custody doctrine, the level of coercion (as evidenced by a number of factors), is examined to determine how a reasonable person in the suspect's position would have understood the situation.

A number of factors already are recognized as being relevant both to the voluntariness inquiry as well as the custody analysis. For example, voluntariness inquiries consider the length of the interview and whether the suspect was permitted to take breaks as factors relevant to the question whether "the defendant's will was overborne," thereby rendering an incriminating statement involuntary. See *Alvarado*, 541 U.S. at 668 (discussing legal standard for voluntariness inquiries); *Haley* v. *Ohio*, 332 U.S. 596, 599-600 (1948) (confession of 15-year-old boy violated due process where, among other facts, "police, working in relays, questioned him hour after hour, from midnight until dawn"). Yet this Court has also looked to both of those factors—length of interrogation and whether suspect was permitted to take breaks—in applying the objective "reasonable person" standard under the *Miranda* custody

analysis. *See, e.g.*, *Alvarado*, 541 U.S. at 664 (noting that one "fact[] weigh[ing] against a finding that Alvarado was in custody" was that the police "twice asked Alvarado if he wanted to take a break"); *Berkemer*, 468 U.S. at 438 (recognizing the relevance of brief versus prolonged interrogations); *Mathiason*, 429 U.S. at 495 (noting that the interview lasted only half an hour).

As a matter of common sense, certain factors will influence a determination about the level or coercion inherent in any interrogation—regardless of whether the relevant inquiry is objective (like the custody test) or subjective (like the voluntariness test). Certain common characteristics are inherent in the interactions between law enforcement officers and suspects, and these factors, when present, will inform any decision that is based upon the totality of the circumstances. The age of the suspect, like the length or location of the interrogation, is one of the objective facts that (when known to the interrogating officer) should inform a court's decision whether the interrogation was custodial in addition to informing a court's decision whether any statement made was voluntary. For voluntariness, the suspect's age matters to the extent that it affects whether the suspect's will was overborne. Under the custody test, to the extent an individual's age affects a reasonable and objective view of whether that person would have felt he or she was free to leave under the particular circumstances, the age of the individual should not be ignored. Cf. *Arvizu*, 534 U.S. at 274-75 (noting that lower court's refusal to consider certain factors "does not take into account the 'totality of the circumstances,' as our cases have understood that phrase," and would "seriously undercut the 'totality of the circumstances' principle which governs the

existence *vel non* of 'reasonable suspicion'"); *Fare* v. *Michael C.*, 442 U.S. 707, 725 (1979) ("The totality approach permits—indeed, it mandates—inquiry into *all* the circumstances surrounding the interrogation." (emphasis added)).

IV. CONSIDERING AGE AS PART OF THE CUSTODY INQUIRY DOES NOT IMPOSE ANY IMPRACTICAL OR INAPPROPRIATE BURDENS ON LAW ENFORCEMENT AND IS CONSISTENT WITH *MIRANDA*'S POLICY GOAL TO PROVIDE CLEAR GUIDELINES TO LAW ENFORCEMENT

Allowing the courts to consider age as a factor that may be relevant in a *Miranda* custody analysis when known by the interrogating officers would not be unduly burdensome or undermine *Miranda*'s goal "to give clear guidance to the police." *See Alvarado*, 541 U.S. at 668; *see also Berkemer*, 468 U.S. at 430. Nor would it "place upon the police the burden of anticipating the frailties [and] idiosyncrasies of every person whom they question," *People* v. *P.*, 233 N.E.2d 255, 260 (N.Y. 1967), quoted in *Alvarado*, 541 U.S. at 667; *Berkemer*, 468 U.S. at 442 n.35. Conversely, a holding that the suspect's age is *never* relevant to the custody analysis could put officers in the odd position of being able to ignore certain facts about the suspect that would have bearing on the interrogation environment. This Court has noted that "[i]t would be unreasonable to expect the police to make guesses as to the nature of the criminal conduct at issue before deciding how they may interrogate the suspect." *Berkemer*, 468 U.S. at 431. For similar reasons, it would be unreasonable to expect the police to pretend that the suspect is someone he is not, or to ignore known facts about the suspect, particularly

facts that bear upon how a reasonable person in the suspect's position would understand his situation. Indeed, to ignore these known facts for purposes of the "custody" analysis would in some ways *add* complications for law enforcement, given that officers will be held responsible for these facts when courts assess the question whether any statements obtained during the interview were voluntary. See *Gallegos*, 370 U.S. at 52-53 (citing *Haley*, 332 U.S. 596).

The rule that provides clearer guidance is the clean principle—articulated by prior cases of this Court—that a fact known to both parties of an interrogation is relevant to the extent that it may have bearing on whether a reasonable person in the interviewee's position would feel that he or she may terminate the questioning and leave. See *Alvarado*, 541 U.S. at 663 (quoting *Stansbury*, 511 U.S. at 322-23); see also *Arvizu*, 534 U.S. at 275 ("The Court of Appeals' view that it was necessary to 'clearly delimit' an officer's consideration of certain factors to reduce 'troubling . . . uncertainty' also runs counter to our cases and underestimates the usefulness of the reasonable-suspicion [totality of the circumstances] standard in guiding officers in the field. . . . To the extent that a totality of the circumstances approach may render appellate review less circumscribed by precedent than otherwise, it is the nature of the totality rule."); *Fare*, 442 U.S. at 725-26 (noting that "the totality approach will allow the court the necessary flexibility" to "take into account those special concerns that are present when young persons . . . are involved," but will also "refrain[] from imposing rigid restraints on police and courts in dealing with an experienced older juvenile" who may, under the circumstances of a particular case, present fewer "special concerns").

In this case, the officer was specially trained in juvenile law enforcement and was well aware of the juvenile suspect's age before and during the interrogation. The officer chose the child's middle school as the site of an interrogation regarding a non-school incident and conducted the interrogation during school hours, in a closed conference room and without contacting the child's guardian. In these circumstances, a rule permitting a court to consider the juvenile's age as part of the custody inquiry would not complicate the analysis of or place undue burdens upon the police. Such a rule simply allows a court to account for the knowledge of the interrogation scene that an officer and suspect both have, consistent with this Court's precedents.

CONCLUSION

The decision of the North Carolina Supreme Court should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-11121

IN THE

Supreme Court of the United States

J.D.B.,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

On Writ of Certiorari to the Supreme Court of North Carolina

BRIEF OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae National District Attorneys Association ("NDAA") is the largest professional organization representing criminal prosecutors in the world. Its members include district attorneys, state's attorneys, attorneys general, and county and city prosecutors with responsibility for prosecuting criminal violations

[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Consent to the filing of the brief was granted by both parties.

in every state and territory of the United States. NDAA was formed in 1950 by local prosecutors to give a focal point to advance their causes and issues at the national level. Among its purposes are to improve and facilitate the administration of justice in the United States and provide to state and local prosecutors the knowledge, skills, and support to ensure that justice is done and the public safety and rights of all are safeguarded.

NDAA urges the Court to uphold the decision of the Supreme Court of North Carolina in *In re J.D.B.*, 363 N.C. 664, 686 S.E.2d 135 (N.C. 2009), *cert. granted*, 131 S. Ct. 502 (2010). On a daily basis, district attorneys around the country interview and question juveniles. The North Carolina Supreme Court correctly concluded that because age is subjective it is not an appropriate consideration in determining whether an individual is in custody for the purposes of issuing *Miranda* warnings. An objective rule provides clear guidance to police officers, prosecutors, and courts, and is crucial to the fair and orderly functioning of the criminal justice system. To abandon the present objective standard would trigger endless litigation over what an interrogating officer should have perceived about a suspect and thus how law enforcement and prosecutors should have treated a particular suspect differently from others. *Miranda* is well known, well understood, and is not in need of change.

SUMMARY OF ARGUMENT

NDAA will demonstrate in this brief that *Miranda v. Arizona*, 384 U.S. 436 (1966) is not implicated in this case because J.D.B. was not in custody. Contrary to Petitioner's suggestion, age does not constitute a restraint on a juvenile's freedom of

movement equivalent to formal arrest. *Miranda* and its progeny have already rejected the use of subjective factors in deciding whether the warning need be given; and though Petitioner contends that age is just another objective factor, as used by Petitioner age is a proxy for intelligence, experience, and knowledge. As applied by Petitioner, age is subjective. But more than that, if age is to be considered in the custody determination, why not gender, race, language proficiency, or any of the many other "objective," "readily observable" characteristics of a defendant? In short, once the door to consideration of a defendant's characteristics is opened there will be no end to the complexity of trying to decide whether a person is in custody so that *Miranda* warnings are required.

ARGUMENT

I. *MIRANDA* WAS AIMED AT THE EVILS OF CUSTODIAL INTERROGATIONS, NOT AT THE KIND OF QUESTIONING THAT HAPPENED IN THIS CASE

Miranda sought to combat the evil of "custodial police interrogation." In the words of Chief Justice Warren, "in the cases before us today . . . we concern ourselves primarily with this interrogation atmosphere and the evils it can bring." *Id.* at 456. The concern was with the tactics that police use when they take control of an individual, remove that person from familiar surroundings, cut them off from family, friends, and supporters then question them at the "unsupervised pleasure of the police." *Id.* at 466.

All the cases decided in *Miranda* involved "incommunicado interrogation of individuals in a police-dominated atmosphere." *Id.* at 445. The Court noted that the key to a successful police interrogation is "privacy – being alone with the person under interrogation," thus creating an "oppressive atmosphere of dogged persistence" in which the police dominate the individual. *Id.* at 449-51. The holding of *Miranda* reflects the concern expressed by the Court: "Accordingly, we hold that *an individual held for interrogation* must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today." *Id.* at 471 (emphasis added).

J.D.B. was not held for interrogation. He was not taken into custody. He was not cut off from his normal environment, placed at the mercy of a policeman, and questioned without surcease. Instead, he was escorted to a conference room at his school by the school resource officer. In the room were the assistant principal of J.D.B.'s school, the assistant principal's intern, and a detective. Once J.D.B. was in the room, the detective mentioned a prior encounter with the police and "asked [J.D.B.] if he would agree to answer questions." *J.D.B.*, 363 N.C. at 666, 686 S.E.2d at 136. Near the end of the 30 to 45 minute conversation, the school bell rang and when the detective learned that J.D.B. rode the bus home, he told J.D.B. that he ought to leave so that he would not miss his bus. J.D.B. was then allowed to leave. *Id.* at 667, 686 S.E.2d at 137. Far from the evils that prompted *Miranda*, J.D.B. was not left to the mercies of the police. He was not held in secret or tricked into confessing. *He was not in custody.*

Petitioner asserts that because middle school students are always expected to obey authority, (Pet. Br. at 28), J.D.B. was in custody. It is unclear whether Petitioner is proposing that questioning a juvenile at school is *per se* custodial. (*Id.* at 27-28 (asserting that middle school students lack "even the right of liberty in its narrowest sense")). In any event, this Court has already rejected the notion that a coercive environment, standing alone, is sufficient to warrant a determination that the person is in custody. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (holding that a "coercive environment" does not make a non-custodial situation custodial). Thus, the fact that the questioning of J.D.B. occurred in an environment in which juveniles were expected to obey adults is not sufficient to show a restraint on movement indicative of formal arrest.

Moreover, Petitioner asserts that the question presented in this case is whether a reasonable person in J.D.B.'s position would have felt he or she was free to terminate police questioning and leave. (Pet. Br. at *i*). But that is not the question at issue in the custody analysis. In the custody analysis the court considers whether a reasonable person would have perceived a restraint on his or her freedom of movement to the degree associated with a formal arrest. *California v. Beheler*, 463 U.S. 1121, 1125 (1983). While J.D.B. may not have felt that he had the authority to walk out of the conference room, that is an entirely different inquiry from whether he felt that he was effectively, if not actually, under formal arrest.

II. THIS COURT HAS ALREADY RULED IN *YARBOROUGH V. ALVARADO* THAT AGE IS NOT A FACTOR IN THE CUSTODY ANALYSIS

Yarborough v. Alvarado, 541 U.S. 652 (2004) holds the answer to this case. The Petitioner spends a great deal of time trying to minimize the importance of the Court's decision in *Yarborough*. According to Petitioner, we should all simply forget that this Court said there that age has no role to play in the *Miranda* test. But this Court knows what it said and it knows the weight to give its own decisions – particularly one in which the Court opined about the very issue that is here under review.

In *Yarborough*, about a month after the shooting of a truck driver in a shopping mall parking lot, seventeen and a half year old Michael Alvarado was interviewed by police in connection with his role in the murder. *Id.* at 656. A detective left word with Alvarado's mother that she wished to speak to Alvarado. His parents brought him to the police station and waited in the lobby while he was interviewed. The detective took Alvarado to a small room and talked to him for about two hours without any *Miranda* warning. The detective and Alvarado were the only two people in the room and their conversation was recorded. *Id.* Twice the detective asked Alvarado whether he needed to take a break. At the end of the conversation, Alvarado was taken home by his father. *Id.* at 658.

When charged with first-degree murder and attempted robbery, Alvarado moved to suppress his statements. In light of Alvarado's trial testimony that the interview with the detective had been a "pretty friendly conversation" and that he had not

felt "coerced or threatened in any way," the state trial court denied the motion on the grounds that the interview was noncustodial. *Id.* Relying on *Thompson v. Keohane*, 516 U.S. 99 (1995), the California appellate court agreed. Emphasizing the absence of any intense or aggressive tactics, it concluded that a reasonable person would have felt at liberty to leave and thus that Alvarado had not been in custody. *Yarborough*, 541 U.S. at 659. On federal habeas review, the Central District of California also agreed that Alvarado had not been in custody for purposes of *Miranda*. *Id.*

The Court of Appeals for the Ninth Circuit ruled that the California courts had misunderstood *Miranda*. According to the Ninth Circuit, the minor's "youth and inexperience" should have been taken into account in evaluating whether a reasonable person in his position would have felt free to leave the police interview. *Id.* at 659-60. That ruling was grounded on the fact that this Court has considered a defendant's juvenile status when evaluating the voluntariness of confessions and the waiver of the privilege against self-incrimination. *Id.* at 660. According to the Ninth Circuit there was no principled reason why the defendant's age should not also be considered in the custody analysis. *Id.* at 668.

This Court disagreed and reversed the decision, holding that the Ninth Circuit's erroneous decision stemmed from its considerable and unwarranted reliance on Alvarado's age and inexperience with law enforcement. *Id.* at 666-67. Surveying *Miranda* and its progeny, this Court concluded: "*Our opinions applying the Miranda custody test have not mentioned the suspect's age, much less mandated its consideration. The only indications in the Court's*

opinions relevant to a suspect's experience with law enforcement have rejected reliance on such factors." Id. (Emphasis added).

Contrary to the rationale of the Ninth Circuit, this Court explained the conceptual difference between the *Miranda* custody test and the situations in which the Court considered age and experience. *Id.* at 667. For example, whether or not a statement was made voluntarily, in the sense that a defendant's will was overborne, logically depends on the characteristics of the accused, that is, age, education, intelligence, and prior experience. *Id.* at 668. But the custody inquiry is different because it focuses on what the police did and said. The goal is to eliminate subjectivity and give the police clear guidance as to what is and is not permissible. Considering characteristics of the suspect like his age "could be viewed as creating a subjective inquiry." *Id.*

Petitioner attempts to discredit *Yarborough* by pointing to the fact that it was not a *de novo* ruling on the age issue. But this Court did not see it that way:

> [R]eliance on Alvarado's prior history with law enforcement was improper not only under the deferential standard of 28 U.S.C. § 2254(d)(1), *but also as a de novo matter.* In most cases, police officers will not know a suspect's interrogation history. *See Berkemer, supra*, at 430-431, 104 S.Ct. 3138. Even if they do, the relationship between a suspect's past experiences and the likelihood a reasonable person with that experience would feel free to leave often will be speculative. . . . We do not ask police officers to consider these contingent psychological factors when deciding when suspects should be advised

> of their *Miranda* rights. *See Berkemer*, *supra*, at 431-432, 104 S.Ct. 3138. The inquiry turns too much on the suspect's subjective state of mind and not enough on the "objective circumstances of the interrogation." *Stansbury*, 511 U.S., at 323, 114 S.Ct. 1526.

Id. at 668-69 (emphasis added).

Yarborough is the main building block for the disposition of the present case and its holding applies equally here. *Miranda* has always stood for the idea that a defendant may not be compelled by the police to provide incriminating testimony against himself. But an individual's age does not bear on the question whether the defendant was *compelled by the police* to provide incriminating testimony. As is evident in *Yarborough*, it would change the nature of the *Miranda* inquiry to introduce a requirement that interrogating law enforcement officials must get into the minds of suspects and figure out whether they felt like they were not free to leave, and on that basis decide whether or not to give *Miranda* warnings.

III. *MIRANDA* AND ITS PROGENY REJECT THE USE OF SUBJECTIVE FACTORS IN DECIDING WHETHER THE WARNING SHOULD BE GIVEN

The notion that the defendant's characteristics should play a role in deciding whether the *Miranda* warning should be given is not a new idea; it was considered and rejected 45 years ago in *Miranda* because the Court sought to establish a simple, clear, bright line rule:

> The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to

> the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. *Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation;* a warning is a clearcut fact.

384 U.S. at 468-69 (emphasis added).

The attributes of the individual are irrelevant to the purposes of and the need for the warning. Thus, if the person is "in custody" being restrained and cut off from others, then the warning must be given; otherwise, not.

In *Berkemer v. McCarty*, 468 U.S. 420 (1984), Justice Thurgood Marshall wrote at length about the importance of avoiding subjective inquiries when making the *Miranda* custody decision. At issue in *Berkemer* was whether a person pulled over by the police in a traffic stop was entitled to *Miranda* warnings before answering questions posed by the police. *Id.* at 435. Though the facts showed that the police officer intended to arrest the driver, the Court held that *Miranda* warnings were not required. *Id.* at 441-42.

In explaining that the unannounced intent on the part of the officer to arrest the driver did not render the driver in custody, Justice Marshall cited with approval the Sixth Circuit's treatment of that fact:

> [T]he Court of Appeals accorded no significance to the parties' stipulation that respondent's "freedom to leave the scene was terminated" at the moment Trooper Williams formed an intent

> to arrest respondent. The court reasoned that a *"'reasonable man' test," not a subjective standard, should control the determination of when a suspect is taken into custody for the purposes of Miranda.*

Id. at n. 4 (citing *McCarty v. Herdman*, 716 F.2d 361, 362, n. 1 (1983) (quoting *Lowe v. United States*, 407 F.2d 1391, 1397 (9th Cir. 1969))) (emphasis added). The *Miranda* custody analysis has always focused on objective facts, not the subjective views of those involved.

A. Age Is A Subjective Consideration In The Context Of *Miranda* Rights.

Applied objectively, age simply has no bearing on the custody analysis. A sixteen year old is no more or less restrained by the use of handcuffs, for example, than is a sixty year old. Because age cannot tell a court or police whether there has been a formal arrest or restraint on freedom of movement to the degree associated with a formal arrest, Petitioner instead uses age as a proxy for the individual's understanding of his legal rights in the situation and, in particular, how he perceives any restraint on his freedom.

Just what impact an individual's age will have on his perception of his circumstances is speculative at best. *Yarborough*, 541 U.S. at 669 (O'Connor, J., concurring) ("Even when police do know a suspect's age, it may be difficult for them to ascertain what bearing it has on the likelihood that the suspect would feel free to leave."). Thus, law enforcement officers and courts are left with the task of determining how a thirteen year old would have perceived being questioned for 30 to 45 minutes by a police

officer in a conference room at his school. This subjective inquiry is precisely what Justice Marshall warned against in *Berkemer*:

> [A]n objective, reasonable-man test is appropriate because, unlike a subjective test, it "is not solely dependent either on the self-serving declarations of the police officers or the defendant nor does it place upon the police the *burden of anticipating the frailties or idiosyncrasies of every person whom they question.*"

Id. at 442, n.35 (citing *People v. P.*, 233 N.E.2d 255, 260 (N.Y. 1967)) (emphasis added).

Yarborough considered whether age constitutes an objective or subjective factor when considered in the context of a *Miranda* custody analysis. 541 U.S. at 668. The Court noted that "the line between permissible objective facts and impermissible subjective experiences can be indistinct in some cases." *Id.* at 667. The "objective" custody test applied by the lower court considered whether a "reasonable 17-year-old, with no prior history of arrest or police interviews" would consider himself free to terminate the interrogation. *Id.* As the court grafts on to the reasonable person more and more of the characteristics of the individual defendant, the objective test begins to look like a subjective question of how that defendant perceived his circumstances. "[C]onsideration of a suspect's individual characteristics-including his age-could be viewed as creating a subjective inquiry," which is not what *Miranda* intends. *See id.* at 668.

Petitioner posits that his formulation of the custody analysis is not subjective because the court and police are only required to consider how a

reasonable juvenile, not any particular juvenile, would have perceived his or her situation. (Pet. Br. at 22). But, a fourteen year old may not perceive his situation in the same way that a sixteen year old does, or a seventeen and a half year old. (*Id.* at 20 (noting that juveniles under sixteen are more likely to comply with adults, and those under fourteen are also less likely to recognize future consequences of their decisions)). How much more "susceptible to police interrogation procedures" is a reasonable thirteen year old? (*Id.* at 19). It is "ordinary common sense" that a ten year old is vastly different from a seventeen year old, (*id.* at 26 (quoting Justice Breyer's dissent in *Yarborough*)), and Petitioner's proposed reasonable juvenile standard would have to be recalibrated by the court in each case to account for the individual defendant's age. This type of custody analysis crosses "the line between permissible objective facts and impermissible subjective experiences." *See Yarborough*, 541 U.S. at 667.

B. Consideration Of Subjective Factors Leads To Uncertainty In Police Investigations.

The Court granted certiorari in *Miranda*, in part, "to give concrete constitutional guidelines for law enforcement agencies and courts to follow." 384 U.S. at 441-42. The central benefit of *Miranda* is that it "inform[s] police and prosecutors with specificity . . . what they may do in conducting [a] custodial interrogation, and [] inform[s] courts under what circumstances statements obtained during such interrogation are not admissible." *Fare v. Michael C.*, 442 U.S. 707, 718, 725 (1979); *Moran v. Burbine*, 475 U.S. 412, 425 (1986) ("'[O]ne of the principal advantages' of *Miranda* is the ease and clarity of its application.").

Adopting Petitioner's dual reasonable man and reasonable juvenile standards only muddies 45 years of settled precedent. When deciding whether to give *Miranda* warnings, police officers need only ask themselves whether the individual they're about to interrogate is under formal arrest or equivalent restraint. This clarity will be destroyed if officers must also consider how an individual's age might impact the perception of the restraints on freedom.

Additionally, Petitioner claims that police should have had no difficulty recognizing a thirteen year old as a juvenile, particularly since he was interrogated at his middle school. But it is not at all clear that had J.D.B. been approached on the street, his age would have been so "readily observable." Indeed, Alvarado was just five months shy of his eighteenth birthday. "It is difficult to expect police to recognize that a suspect is a juvenile when he is so close to the age of majority." *Yarborough*, 541 U.S. at 669 (O'Connor, J., concurring). But Petitioner's reasonable juvenile standard would apply regardless of whether the interrogating officer correctly guessed the age of the individual. And, even where officers know the age of the individual, they are still left to speculate as to what effect age will have on the perception of the circumstances. *Miranda*, 384 U.S. at 468-69 (assessments of factors such as age and experience "can never be more than speculation."). Expanding *Miranda* by asking police officers to consider what impact a juvenile's age will play in the analysis of the restraints on the juvenile's freedom of movement is unworkable.

IV. *MIRANDA* IS CONCERNED WITH THE COMPULSIVE CHARACTERISTICS OF CUSTODIAL INTERROGATION, NOT THE CHARACTERISTICS OF THE PERSON BEING INTERROGATED.

Miranda only applies where there was a "formal arrest or restraint on freedom of movement" akin to a formal arrest. *California v. Beheler*, 463 U.S. 1121, 1125 (1983). "[A] noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that . . . the questioning took place in a 'coercive environment.'" *Mathiason*, 429 U.S. at 495. Rather, the reviewing court "must examine all of the circumstances surrounding the interrogation. . . ." (*Stansbury v. California*, 511 U.S. 318, 322 (1994) *(per curiam)*. "An understanding of the nature and setting of this in-custody interrogation is essential . . . ." *Miranda*, 384 U.S. at 445.

Because *Miranda* focuses on actions by the police to compel incriminating testimony, the "circumstances surrounding the interrogation" test has always been about whether the officers used handcuffs, the length of the interrogation, the number of officers in the room, what officers said to the defendant, where officers conducted the interrogation, whether officers allowed the defendant contact with others outside the interrogation room, whether officers were standing guard at the door, and other things of that kind. *See Thompson*, 516 U.S. at 118, (stating that the factors a reviewing court should consider "include, at a minimum, the location, timing, and length of the interview, the nature and tone of the questioning, whether the defendant came to the place of questioning voluntarily, the use of physical

contact or physical restraint, and the demeanor of all of the key players . . . ."). The custody analysis has never concerned itself with the characteristics of the individual being questioned.

This focus on the circumstances of a custodial interrogation is the reason that the Court in *Beckwith v. United States*, 425 U.S. 341, 345 (1976), rejected the argument because police had focused their investigation on Beckwith, he was under "psychological restraints" which rendered him in custody. The Court said that Beckwith's "argument that he was placed in the functional, and, therefore, legal, equivalent of the *Miranda* situation asks us now to ignore completely that *Miranda* was grounded squarely in the Court's explicit and detailed assessment of the peculiar 'nature and setting of . . . in-custody interrogation.'" *Id.* at 346.

For all his efforts, Petitioner has not cited a single case from this Court where the question of custody turned on the individual characteristics of the suspect. And there are none.

V. THERE IS NO COMPELLING REASON TO MODIFY *MIRANDA*

There is "a strong presumption against expanding the *Miranda* rule any further." *United States v. Patane*, 542 U.S. 630, 640 (2004). The Court has only permitted modifications that are consistent with *Miranda's* underlying principles. *Fare v. Michael C.*, 442 U.S. 707, 717 (1979). It would change the nature of the *Miranda* inquiry to introduce a requirement that interrogating law enforcement officials must get into the minds of suspects and figure out whether they felt like they were not free to leave and on that basis decide whether or not to give *Miranda* warning.

Petitioner's attempt to expand *Miranda* in this way is antithetical to its underlying principles and should be rejected.

What Petitioner is really saying here is that juveniles are predisposed to confess with only a modicum of encouragement from police. (Pet. Br. at 19 (stating that children are "especially susceptible to police interrogation procedures"); *id.* at 20 ("juveniles . . . are significantly more likely to comply with adult authority in a legal setting and confess" and "less able . . . to recognize the future consequences of their legal decisions."); *id.* at 26 ("Juvenile offenders are objectively vulnerable.")). But, just as *Miranda* does not prevent officers from using non-coercive interrogation techniques, it does not stand in the way of those individuals predisposed to tell the truth. *Miranda,* 440 U.S. at 478 ("Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence."). It *only* precludes confessions resulting from physical and psychological coercion by the police. *Colorado v. Connelly*, 479 U.S. 157, 170 (1986) ("[T]he Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.'") (quoting *Oregon v. Elstad*, 470 U.S. 298, 305 (1985)). Expanding the custody analysis in an effort to protect juveniles, not from the coercive actions of police, but from their own inclination to tell the truth is inimical to the principles of *Miranda*.

CONCLUSION

For the reasons stated above, the decision of the Supreme Court of North Carolina should be upheld.

Respectfully submitted,

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